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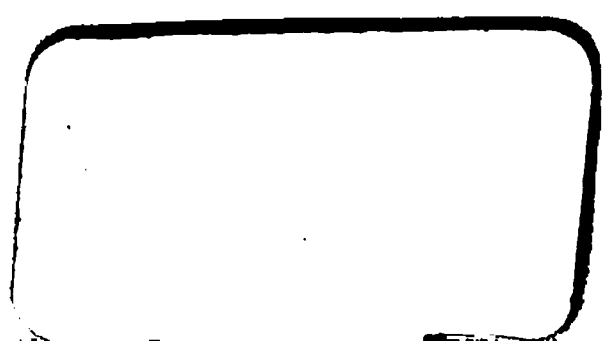
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Second Edition.

A TREATISE
ON
THE LIMITATION OF ACTIONS
AT LAW AND IN EQUITY.

With an Appendix,
CONTAINING THE
AMERICAN AND ENGLISH STATUTES OF LIMITATIONS.

By H. G. WOOD,
AUTHOR OF "THE LAW OF NUISANCES," "MASTER AND SERVANT,"
"FIRE INSURANCE," "LANDLORD AND TENANT,"
"LAW OF RAILROADS," ETC.

IN TWO VOLUMES.

VOL. I.

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PUBLISHERS' NOTE TO SECOND EDITION.

THE present edition was the author's last work before his sudden death, the proofs having been returned by him to the printer only a few days before he died.

The text has been thoroughly revised, resulting in many changes and additions in accordance with the latest statutes of the various States and the decisions of the Courts. Over two thousand additional cases are cited, and the Appendix, embodying the English Statute of Limitations, as well as those of all the States and Territories, has been thoroughly revised. It was the author's aim throughout to make his references to the latest Revision or Code, and in each case the subsequent laws have been examined to bring the Statutes down to date as far as published.

The success of the first edition in 1882, and the important changes in the Statutes of Limitations enacted within the last ten years, encouraged the author and his publishers to hope for the same favorable reception for the present edition as was accorded to the first.

P R E F A C E.

THE radical changes wrought in the statutes of limitations in the several States of this country within the last twenty years, and in the theories applicable thereto, render a new work adapted to the present condition of the statutes indispensable.

I have endeavored to bring together in one volume all that is material upon the subject. In order to do so I have been compelled to precipitate much matter into the notes, which would properly have found a place in the text; but this method will be found to detract from the symmetry of the work, rather than its usefulness, as the index is very full, and covers the notes as well as the text. I have not attempted to cite all the cases involving questions of the application or construction of these statutes, as they are quite too numerous, but have endeavored to give all which involve difficult questions, and such as are authoritative. I have given in the Appendix the English Statutes of Limitations, as well as those of all the States of this country, and of all the Territories, so far as their statutes were accessible to me. These statutes will be found reliable, and to cover all legislation in the several States upon the matter of general limitations to date; and I have made arrangements to have printed upon slips (which can readily be pasted into the Appendix), such changes in or amendments to the several statutes as may be made from time to time, which will be furnished gratuitously to any mem-

ber of the profession who purchases a copy of the work, who will forward his address to the publishers, so that the exact state of the statutory law may at all times be represented by the Appendix.

In a work of this character, predicated entirely upon statutes, and the law growing out of their application and construction, and involving the examination of such a large number of cases, it would not be strange if some errors have crept into it; and if any are discovered, however slight, I would be very glad to have my attention called thereto, that they may be corrected in any future editions. I have given the gist of a great number of cases both in the text and notes, and have endeavored to make the work as useful as is possible, in the space allotted me, to that class of lawyers to whom a complete library of the reports is not accessible.

H. G. WOOD.

BOSTON, Nov. 1st, 1882.

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S T A T U T E S
OF
T H E L I M I T A T I O N O F A C T I O N S .

STATUTES

OF

THE LIMITATION OF ACTIONS.

CHAPTER I.

WHAT ARE — HISTORY OF — GENERAL RULES.

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| SEC. 1. What are Statutes of Limitation. | SEC. 9. Distinction where Statute gives and limits the Remedy. |
| 2. History and Origin of. | 10. Rule when Title to Personal Property is acquired by Possession under Statute of one State. |
| 3. Adverse Possession. | 11. Constitutionality of Limitation Acts. |
| 4. Nature of Statutes of Limitation. | 12. What Statute governs. |
| 5. Principles on which founded. | 13. Effect of Change of Statute, as to Crimes. |
| 6. General Rules. Statute having commenced to run will not stop. | 14. Rule when Title to Land is concerned. |
| 7. Bar of Statute must be interposed by the Debtor. | |
| 8. The Law of Limitations a Part of the <i>Lex Fori</i> . | |

SEC. 1. What are. — Statutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced; and those statutes which merely restrict a statutory or other right do not come under this head, but rather are in the nature of conditions put by the law upon the right given. Thus, a statute that prescribes the term of court at which an indorsee of a note is required to sue the maker in order to hold the indorser liable,¹ or the time within which

¹ *McDaniel v. Dougherty*, 42 Ala. 506; *Davidson v. Petticolas*, 34 Tex. 27. "Statutes of limitations," says the court in *Elder v. Bradley*, 2 Sneed (Tenn.), 247, "are rigorous rules the enactment of which public policy demanded." They differ essentially from the civil-law doctrine of prescription, as they act simply upon and defeat the remedy; while the latter defeat the right itself. *Billings v. Hall*, 7 Cal. 1. But

instances often arise where these statutes not only defeat the remedy for the recovery of personal property, but also act upon the title, and defeat the rights of the party against whom it has run, so as to divest him of the title thereto in any jurisdiction. *Sims v. Canfield*, 2 Ala. 555; *Fears v. Sykes*, 35 Miss. 633; *Newcombe v. Leavitt*, 22 Ala. 631; *Winburn v. Cochran*, 9 Tex. 123.

writs of error shall be brought,¹ or a statute which fixes the time within which lands sold on execution may be redeemed,² or within which a judgment or other lien shall be enforced,³ or which merely postpones a claim unless enforced within a certain time,⁴ or which provides that a certain class of evidence shall be admissible if action is brought within a certain time,⁵—are not statutes of limitation within the legal sense of the term, and consequently are not affected by any act suspending, extending, or repealing such statutes. But statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are statutes of limitations, although they merely act upon the remedy, and do not extinguish the claim.⁶ In other words,

¹ *Pace v. Hollaran*, 31 Tex. 358 ; *Trim v. McPherson*, 7 Coldw. (Tenn.) 15. In Georgia, it is provided by § 3525 of the Revised Code that, when any person has *bona fide* and for a valuable consideration purchased real or personal property, and has been in possession of such real property for four years and of such personal property for two years, the same shall be discharged from the lien of any judgment against the person from whom he purchased ; and this is held not a statute of limitations, but rather a condition put by law upon the lien of the judgment, like the duty of recording a mortgage, and consequently that it does not come within the purview of a statute suspending temporarily all statutes of limitation. And in Tennessee a similar doctrine was held in reference to a statute which allows a party to whom land has been sold on execution to redeem the same within two years. *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221. So, also, in Texas, a statute providing that a creditor of a deceased person must present his claim against the estate within twelve months, or it will be postponed until all the claims which were presented within that time have been fully paid, was held not a statute of limitations, but rather a condition imposed upon the creditor. *Chandler v. Westfall*, 30 Tex. 475 ; *Ryan v. Flint*, id. 382.

² *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221.

³ *Battle v. Shivers*, 39 Ga. 405 ; *Chapman v. Aken*, id. 347 ; *Darby v. Isbell*, id. 342.

⁴ *Chandler v. Westfall*, 30 Tex. 475 ; *Ryan v. Flint*, id. 382.

⁵ *Neville v. Northcutt*, 7 Coldw. (Tenn.) 294.

⁶ *Horton v. Clark*, 40 Ga. 412 ; *McMillar v. Werner*, 35 Tex. 419.

In *Stillwell v. Coons*, 122 N. Y. 242, the plaintiff, as superintendent of the poor of the county of S., after receiving notice from the overseer of the poor of the town of T., that he had given temporary relief to one H. a pauper, who had formerly resided in the town of B. in another county, with a statement of the circumstances of the case, believing that the removal of H., to the town of T., was prohibited by the Revised Statutes mailed to the defendant, the overseer of the poor of the town of B., a notice of the removal, with a request that he provide for the relief and support of H., within the thirty days prescribed by the statute. After service of notice the plaintiff received an answer from C. denying unequivocally, but not in the words of the statute, that H. was a pauper while he lived in his county, and denying any liability for his support. These transactions were prior to the amendment to the provisions of the Revised Statutes in reference to the removal of paupers from one town to another. More than six months after receipt of an answer, this action to recover for such support was commenced. It was held that as the action was not commenced within three months after receiving the defendant's denial of liability, it was barred by the statute. Also, that the denial of liability was sufficient ; that it was not necessary it should follow the language of the statute.

In *re Will of Gouraud*, 95 N. Y. 256, it was held that in proceedings taken under the statute for the revocation of the probate of a will of personal property, the contestant is not confined to matters which

statutes which destroy a remedy or a right unless enforced within a certain specified period are statutes of limitation, and those which merely suspend a remedy or right unless enforced within a certain time are not statutes of limitation in any sense.

At the common law there was no limitation as to the time within which an action might be brought. But courts of equity, recognizing the injustice of enforcing stale demands, adopted a rule that in all cases the payment of a bond or other specialty would be presumed after the period of twenty years, and courts of law adopted the same rule.¹

This presumption of payment existed independently of any statute, and differs in many respects in its effect from the statutory limitation. In a Pennsylvania case,² MR. JUSTICE CLARK says: "This presumption is an established rule of the law derived by analogy from the English statute of limitations. It originated in equity and was afterwards engrafted into the common law, and has since been steadily maintained. It is not, like the statute of limitations, a bar to the action on the original contract, therefore a new promise is not necessary to sustain the suit. Any competent evidence which tends to show that the debt is unpaid is admissible for that purpose. The evidence made consists of the defendant's admissions made to the creditor himself, or to his agent, or even to a stranger, but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to a demand for the debt. It is of no consequence that the admission of non-payment is accompanied by the refusal to pay. The action is not founded upon a new promise, but upon the original indebtedness. The question as against the presumption, is whether or not the debt is in fact unpaid."

This presumption of payment may be overcome by evidence which would be wholly insufficient as against the general statute of limitations,³ as if non-payment is established by an admission of the indebtedness, although such admission is accompanied by refusal to pay and denial of liability to pay, yet the presumption is defeated.⁴

were not investigated and tried when the will was admitted to probate, but the whole case is left open, and he has the right to have the questions then litigated and determined tried, the same as if no adjudication had been had thereon.

To bring the case within the one year's limit fixed by said statute it was not essential to have a citation issued within the year; it was sufficient if the requisite allegations were filed with the surrogate within that time. The rule is the same under the code except that a petition in

the form prescribed is required to be filed within the year, instead of allegations.

¹ *Bean v. Tonnele*, 94 N. Y. 381.

² *Gregory v. Com.*, 121 Penn. 611.

³ *Walker v. Robinson*, 136 Mass. 280.

⁴ *Bentley's Appeal*, 99 Penn. St. 500; and see *Shubrick v. Adams*, 20 S. C. 49, where it is held that in order to overcome this presumption the evidence must be of a character sufficient to overcome the statutory bar.

In a Pennsylvania case,¹ MR. JUSTICE STRONG, after commenting on the essential difference between this presumption and the statutory bar, says: "The latter [the statute] is removed by nothing less than a new promise to pay or an acknowledgment consistent with such a promise. The presumption is rebutted, or to speak more accurately, does not arise where there is affirmative proof beyond that furnished by the specialty itself that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor."

SEC. 2. **History and Origin of.** The law relating to the limitation of actions, so far as questions of title or contract are concerned, is merely the creation of statute. At the common law there was no limit to the time within which an action might be brought, except in the single instance of a fine, with proclamations.² But in the case of torts the maxim, "*actio personalis moritur cum persona*," applied, and therefore were only limited by the duration of the life of either party. The want

¹ Read v. Read, 46 Penn. St. 239.

² In the instance of a fine with proclamations, the time within which a stranger might make a claim was limited to a year and a day thereafter, and by Stat. 32 Hen. VIII. c. 2, this was enlarged to five years. Co. Litt. 26 a. As to the statement that this was the only limitation at common law, see Blaushard, 4. The statement of BRACTON to the contrary, "*omnes actiones in mundo infra certa tempora habent limitationem*," Lib. 2, fol. 52, is extremely doubtful. As one author expresses it, "as doubtful as the Latinity." Banning on Limitations, 1. LORD COKE says that the limitation of actions was by force of various statutes. Co. Litt. 115; 2 Int. 95; 4 Coke, 10; 5 Bacon's Abr. 461; Spelm's Glossary, 32. And such seems to be the generally accepted idea both of text-writers, Banning on Limitations, 1-8, and the courts, Wall v. Robson, 2 N. & McCord (S. C.), 499; People v. Gilbert, 18 Johns. (N. Y.) 227; Wilcox v. Finch, 20 id. 475. The lapse of time, as twenty years, without the institution of legal proceedings for the recovery of a debt, was held to afford a strong *prima facie* presumption of payment, or that the cause of action had been satisfied. Bracton, lib. 2, fol. 282, says: "*Omnis querela et actio injuriarum limitata est infra certa tempora*." And also see 2 Inst. 95. As, however, no precise time was fixed at the common law when a claim should be re-

garded as absolutely extinguished, it was found necessary for the protection of trade and commerce, as well as of the rights of parties generally, to fix such period by statute. These statutes affect only the remedy. They go "*ad litis ordinationem*," and not "*ad litis decisionem*," in a just judicial sense. Their object is to fix a certain period within which action may be brought, whether by citizens or foreigners, and thus enable debtors to enjoy a repose from stale demands. They are now generally regarded with favor, and as being in the interest of justice, and for the prevention of fraud, by compelling parties to bring their actions before the proofs for or against their claims are lost. Story on Conflict of Laws, sec. 576.

United States v. Thompson, 98 U. S. 486; Bean v. Tonnele, 94 N. Y. 381; Black v. Platt, &c. Coal Co., 85 Ala. 504; Harrison v. Heflin, 54 Ala. 552; Gregory v. Com., 121 Penn. St. 611; Runner's Appeal, 121 id. 649; Breneman's Appeal, 121 id. 641; Porter v. Nelson, 121 id. 628; Lash v. VonNida, 109 id. 207; Hays' Appeal, 113 id. 380; *In re* Neilley, 95 N. Y. 382; Wells v. Washington, 6 Munf. (Va.) 532; Kriss v. Kriss, 28 W. Va. 388; Tucker v. Baker, 94 N. C. 162; Buie v. Buie, 2 Ired. (N. C.) 87; Walker v. Robinson, 136 Mass. 280; Van Rensselaer v. Livingston, 12 Wend. (N. Y.) 490.

of a limitation was supplied, in a measure, by a doubtful doctrine of presumption,¹ and also by the trial by wager of law, which is believed

¹ At the common law a presumption was raised from the non-payment of a debt for twenty years, that it had been paid, throwing the burden of establishing non-payment upon the party seeking to enforce it; and this presumption still exists, notwithstanding the statutes of limitations. *Carr v. Dings*, 54 Mo. 95. LORD ELLENBOROUGH, in *Williams v. Jones*, 13 East, 449. The right of action descended to the plaintiff's representative, against the representative of the defendant, for an unlimited time. *Banning on Limitations*, 10. But in actions for torts, the rule *actio personalis moritur cum persona* prevailed; and on the death of either party, not only an action, but all right of action, died with the person; and such is now the rule, except in so far as the right is saved by statute. To remedy this evil (for it really was so), the statute of 21 James I. c. 16, was passed, limiting the time within which actions arising out of contracts, and a certain class of torts, should be brought. The third section of this act is as follows: "All actions of *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account, and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, or imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say), the said actions upon the case (other than for slander), and the said actions for trespass, debt, detinue, and replevin for goods or cattle and the said action of trespass, *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suits and not after; and the said actions of trespass, assault,

battery or wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions and not after; and the said actions upon the case for words, within one year next after the end of this present session of Parliament, or within two years next after the words spoken and not after." Secs. 4 and 7 of the act are as follows: "4. And nevertheless, be it enacted, That if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after. 7. Provided nevertheless, and be it further enacted, That if any person or persons that is, or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words be, or shall be, at the time of any such cause of action, given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions so as they take the same within such times as are before limited after their coming to, or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done." It will be observed that there is no direct mention in this act of the action of assumpsit, which is the most important of all the

to have operated as a check on stale demands.¹ When the abuses from stale demands became so great as to be unendurable, the legislature did not at first fix any certain and progressive period within which actions should be commenced, but from time to time chose for that purpose certain notable times; and in this way, by virtue of various statutes, the beginning of the reign of King Henry the First, the return of King John from Ireland, the journey of Henry the Third into Normandy, and the coronation of King Richard the First, were successively chosen, that suits and actions, the cause of which arose previous to their respective dates, should be barred.² The early statutes had reference to realty alone, and, though productive of immediate relief, the advantage was only temporary, and in the reign of Henry the Eighth a more commodious course was taken, so that, in the language of LORD COKE, "by one constant law certain limitations might serve both for the time present and for all times to come."³ This was effected by the statute 32 Hen. VIII. c. 2,⁴ by which the limitation of time, in every case, was reduced to a fixed interval between the accrual of the right and the commencement of the action. These intervals were, in the various cases, periods of thirty, fifty, and sixty years. The statute 21 James I. superseded all prior statutes, and, with some exceptions, is substantially in force in many of the States, and practically in all of them, as its leading features have been incorporated to a greater or less extent in all of them; and except where essential changes have been made, the decisions of the English courts under that statute are generally accepted by our courts as affording sound rules of construction.⁵

actions; but it was held to embrace this action, as being fairly within the reason of the act, if not fairly considered to be embraced in the action of trespass on the case. Bacon's Abr. Limitations, E 1; *Harris v. Saunders*, 4 B. & C. 411; *Piggott v. Rush*, 4 Ad. & El. 912; *Inglis v. Haigh*, 8 M. & W. 769. This statute did not embrace specialties, or contracts under seal, judgments, or other matters of record properly coming under that head; but these were provided for by a later statute, 3 & 4 Wm. IV. c. 27, which made it necessary to bring an action for such debts within twenty years.

¹ By this method a defendant was allowed to clear himself by his own oath and that of eleven compurgators. In the Code Napoleon, Civil, 2275, something analogous to the wager of law is preserved, but the purpose is opposite, viz. to prevent abuse from the law of limitations. Wager

at law only applied to an action of debt on a simple contract, and of detinue. The action of assumpsit did not come into general use until after *Slade's Case*, 7 Mod. 112, in the year 1603, and as through it wager at law was avoided, it took the place of actions of debt on simple contracts, as the action of trover took the place of detinue. *Wilkinson on Limitations*; 3 Blackstone's Com. 341; 2 Bouv. Law Dic. (Wager of Law).

² Hale's Common Law, 152; Co. Litt. 114 b, 115 a.

³ 2 Inst. 95.

⁴ Co. Litt. 115 a.

⁵ *Walden v. Gratz*, 1 Wheat. (U. S.) 292. In the statute 21 James I. c. 16, the rights of the crown were to be barred at the expiration of sixty years from the beginning of the then session, viz. February 19, 1623. The limit of legal memory still dates from the time of Richard I.

SEC. 3. Adverse Possession. — The statute of James applied to real as well as personal actions, and was the principal act of limitation in England as to both, until the adoption of the statute 3 & 4 Wm. IV. c. 27. Prior to the adoption of the latter statute, the construction of the statute of James, relative to realty, had become involved in almost hopeless confusion, especially so far as the old doctrine of adverse possession was concerned. Indeed, so great had become the doubts as to the true construction of this portion of that statute, that LORD MANSFIELD, in speaking of it in a leading case,¹ upon this branch of it, made use of this strong expression: "The more we read, the more we shall be confounded." But in England this statute was greatly modified by the statute 3 & 4 Wm. IV. This statute greatly simplified the law by abolishing, in the old sense of the expression, the doctrine of adverse possession; and although in England some important changes have been made² in these statutes, especially so far as relates to the length of limitation, the main features of the statute Wm. IV. have been left undisturbed. In this country there is more diversity in the statutes relating to realty than in reference to personal actions; but this matter will be treated of, so far as our statutes are concerned, in a separate chapter, and we will not pursue it further here.

SEC. 4. Nature of Statutes of Limitations. — Statutes of limitations were formerly regarded with little favor, and the courts devised numerous theories and expedients for their evasion; but latterly they are considered as beneficial, and resting on principles of a sound public policy, and as not to be evaded except by the methods provided therein.³ Indeed, they are now termed statutes of repose,⁴ and are re-

¹ *Atkyns v. Horde*, 1 Burr. 60; 2 Smith's L. C.

² 37 & 38 Vict. c. 57.

³ *Reid v. Clark*, 8 McLean (U. S.), 480; *Clementson v. Williams*, 8 Cranch (U. S.), 72; *Roberts v. Pillow*, 13 How. (U. S.), 472; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *McCluney v. Silliman*, 3 id. 270; *Hawkins v. Barney*, 5 id. 457; *Bradstreet v. Huntington*, id. 402. But, to avail himself of it, a party must bring himself strictly within its provisions. *Russell v. Barton*, 6 McLean (U. S.), 577; *Sanborn v. Stetson*, 2 Story (U. S. C. C.) 481. Such statutes are regarded "as beneficial." *Hart's Appeal*, 32 Conn. 540; *Peck v. Botsford*, 7 id. 172; *Weed v. Bishop*, id. 172; *Marshall v. Dolliber*, 5 id. 480; *Lord v. Shaler*, 3 id. 131. They are looked upon "as furnishing a presumption of payment, rather than as a statutory bar to a valid claim." HINMAN, C. J., in

Hart's Appeal, *ante*. In *People v. Judge of Wayne Co.*, 27 Mich. 138, the court says: "The early decisions, made when the statute of limitations was regarded as an unconscionable defence, allowing a plaintiff who had been consulted upon his original declaration, and whose real cause of action had become barred, to evade the statute by amending his declaration, ought not to be followed at the present day. Statutes of limitations are now generally regarded as statutes of repose, and construed with the same favor as other statutes, to effect legislative intent."

⁴ In *Roberts v. Pillow*, 1 Humph. (Tenn.) 624, the court says: "Statutes of limitations are founded on sound public policy, are statutes of repose, and are not to be evaded by a forced construction." In *Bell v. Morrison*, 1 Pet. (U. S.) 360, STORY, J., gives these statutes his unqualified approval. He says: "Statutes

garded as essential to the security of all men ;¹ and opinion, professional and general, has been in favor of a continuous augmentation of their stringency, as is evinced by the numerous stringent changes made in their provisions by the legislatures of nearly all the States within the last few years, especially as to the character of proof required to remove the statutory bar, and as to the periods of limitation, and the extension of their provisions to a large class of cases not embraced in former statutes. These statutes are declared by LIVINGSTON, J.,² "among the most beneficial to be found in our books." "They rest upon sound policy, and tend to the peace and welfare of society ;"³ and are so construed as to effectuate the intention of the legislature, although in individual cases they may seem to be productive of great hardship. There certainly can be no hardship in requiring parties to settle their business matters within certain reasonable periods before human testimony is lost and before human memory fails ; and if, with the sure prospect of losing the right to a remedy thereon, they stand by inactive and permit their claim to be barred, it is not the law, but the party, who is responsible for the hardship entailed. There can be no question that laws of limitation are founded on correct and salutary principles, although, in isolated cases, they may be productive of great hardship ; therefore, although they are to be encouraged, yet, as they are acts which take away existing rights they should always be construed with reasonable strictness, and for the benefit of the rights sought to be defeated thereby, so far as can be done consistently with their letter and spirit. In this country it was at one time seriously questioned whether these statutes were not unconstitutional, as interfering with the rights of property, guaranteed by the paramount law of the Constitution ; but it has come to be pretty well settled that to make or repeal them is not an interference with a vested right, except when they are made to act retrospectively.⁴

of limitation, instead of being received in an unfavorable light, as an unjust and discreditable defence, should have received such support from courts of justice as would have made them what they were intended emphatically to be, statutes of repose." *Martin v. Tully*, 72 Ala. 24 ; *Shepherd v. Thompson*, 122 U. S. 231.

¹ 2 Salk. 421.

² *Fisher v. Harnden*, 1 Paine (U.S.C.C.), 61.

³ McLEAN, J., in *McCluny v. Silliman*, 3 Pet. (U. S.) 270. See also *Green v. Johnson*, 3 G. & J. (Md.) 394 ; *McCarthy v. White*, 21 Cal. 495 ; *Richmond v. Maryland Ins. Co.*, 8 Cr. (U. S.) 84 ; *Phillips v. Pope*, 10 B. Mon. (Ky.) 163 ; *McQueen v. Babcock*, 3 Abb. App. (N. Y.) 129 ; *Dickinson v. McCanny*, 5 Ga. 486.

⁴ *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. (U. S.) 105. In *Bank of Alabama v. Dalton*, 9 How. (U. S.) 522, a State statute declaring that any judgment obtained in another State prior to the passage of such statute should be barred, unless suit was brought thereon within two years after the passage of the act, was held constitutional. But in *Christmas v. Russell*, 5 Wall. (U. S.) 290, a State statute, which provided that "no action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment, &c., was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred

SEC. 5. Principles on which founded. — According to Pothier, the principles upon which laws of limitation and prescription are founded depend in part upon the presumption of payment or release arising from the lapse of time, inasmuch as it is not common for a creditor to wait so long, and prescriptions are founded on the ordinary course of things, “*ex eo plerumque fit*,” and partly, also, because a debtor ought not to be obliged to take care for ever of his acquittances, which prove a demand to have been satisfied; and it is proper to limit a time beyond which he shall not be under the necessity of producing them.¹ They are, too, according to the same authority, partly established for the punishment of the creditor. The law having allowed him a time to institute his action, the claim ought not to be received when he has suffered that time to elapse.² Whatever may formerly have been thought to be the ground upon which these statutes are based, it is now quite generally conceded that their purpose was, and is, to compel the settlement of claims within a reasonable period after their origin; and while the evidence upon which their enforcement or resistance rests is yet fresh in the minds of the parties or their witnesses, and that there is no presumption to be raised either as to payment or otherwise, from the mere lapse of the statutory period, more than would naturally arise as to any stale demand.³

SEC. 6. General Rules. Statute having commenced to run will not stop. — Before proceeding to discuss the topics involved, in detail, there are some general rules, of almost universal application, which it may be well to notice. And it is proper to say here, that while the statutes of the various States apparently differ in their essential provisions, there is, after all, no material difference in their general results, or the principles controlling them, and they are all founded upon the statute of James, and retain the essential provisions of that statute, with some modifications and additions, so that the principles evolved from the cases will be equally applicable in all the States.

One of the most important and universal rules (which is not, however, without exception) is, that time, when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event which is not within the saving of the statute.⁴ Thus, it has been held that it

by any act of limitation of this State if such suit had been brought therein,” was held unconstitutional and void, because it impairs the right of a party to enforce a judgment regularly obtained in another State, and entitled to full faith and credit in the State in which he sues upon it. *Edmonds v. Waugh*, L. R. 1 Eq. 421.

¹ *Evans's Pothier*, 644.

² *Id.*

³ *McCarthy v. White*, 21 Cal. 495.

⁴ *Conover v. Wright*, 6 N. J. Eq. 618; *Clark v. Richardson*, 4 N. J. Eq. 347; *Roberts v. Moore*, 8 Wall. Jr. (U. S.) 292; *De Kay v. Darrah*, 3 N. J. Eq. 288; *Wright v. Scott*, 4 Wash. (U. S. C. C.) 16; *Pinckney v. Burrage*, 31 N. J. L. 21; *Thorpe v. Corwin*, 20 N. J. L. 311; *Bradstreet v. Clark*, 12 Wend. (N. Y.) 602; *Peck v. Randall*, 1 Johns. (N. Y.) 165; *Kestler v. Hereth*, 75 Ind. 177; *Cole v. Runnels*, 6 Tex. 272; *Chevalier v. Durst*,

is no answer to a plea of the statute, unless otherwise provided therein, that, after the cause of action accrued, and after the statute had commenced to run, the debtor within six years died, and that by reason of litigation as to the right of probate, an executor of his will was not appointed until after the expiration of six years, and that the action was brought within a reasonable time after probate was granted.¹ In another English case,² LORD KENYON says: "I never heard it doubted

id. 239; *Den v. Richards*, 15 N. J. L. 347; *Coy v. Nichols*, 5 Miss. 31; *Pearce v. House*, Term Rep. (N. C.) 305; *Fitzhugh v. Anderson*, 2 H. & M. (Va.) 289; *Hudson v. Hudson*, 6 Munf. (Va.) 352; *Fewell v. Collins*, 3 Brev. (S. C.) 286; *Parsons v. McCracken*, 9 Leigh (Va.), 495; *Faysoreux v. Prather*, 1 N. & McCord (S. C.), 296; *Rogers v. Hillhouse*, 3 Conn. 398; *Tyson v. Britton*, 6 Tex. 222; *Crosier v. Gano*, 1 Bibb (Ky.), 257. Thus, except where the statute otherwise so provides, the fact that the action was enjoined will not prevent the statute from running. *Barker v. Miller*, 16 Wend. (N. Y.) 592; *Berrien v. Wright*, 26 Barb. (N. Y.) 208; *Sands v. Campbell*, 31 N. Y. 345; *Prideaux v. Webber*, 1 Lev. 81; *Bacon's Abr. Limitations*, 238 (E), 6. There is a well-known instance of the application of this rule drawn from the time of the English civil wars. Thus, in an action in answer to a plea of the statute, the plaintiff replied that a civil war had broken out, and that the government was usurped by certain traitors and rebels, which hindered the course of justice, and by which the courts were shut up, and that within six years after the war ended he commenced his action, and yet his replication was held to be bad; and in confirmation of this doctrine we find an act of Parliament of 1 W. & M. c. 4, whereby it was expressly enacted that the interval that elapsed from the day of the departure of King James, on the 10th December, 1687, till the assumption of the government by King William, on the 12th of March, 1688, should not be accounted any part of the time within which any person by virtue of the statute of limitations might bring his action. *Prideaux v. Webber*, *ante*; *Bacon's Abr. Lim.* 238 (E), 6. *Doyle v. Ward*, 23 Fla. 90.

¹ *Rhodes v. Smethurst*, 4 M. & W. 42; *Daniel v. Day*, 51 Ala. 481; *Meeks v. Vas-*

sault, 31 Ark. 364; *Hapgood v. Southgate*, 21 Vt. 584; *Conant v. Hitt*, 12 id. 285; *Sambs v. Stein*, 53 Wis. 569; *Baker v. Brown*, 18 Ill. 91; *Pitkin v. Hewitt*, 17 Ala. 291; *Baker v. Baker*, 13 B. Mon. (Ky.) 406; *Hagman v. Vieally*, 3 Cr. (U. S.) 325; *Lynan v. Walker*, 35 Cal. 634; *Hull v. Deatly*, 7 Bush (Ky.), 687; *Brown v. Merrick*, 16 Ark. 612; *Stewart v. Sheldon*, 5 Md. 434; *McCullough v. Speed*, 3 McCall (S. C.), 455. In *Johnson v. Wren*, 3 Stew. (Ala.) 84, the court held that the statute of limitations does not begin to run until there is some one to sue, or liable to be sued, but that when the statute once begins to run, the death of neither party impedes its operation. See also *Granger v. Granger*, 6 Ohio, 35; *Beauchamp v. Mudd*, 2 Bibb (Ky.), 537; *Nicks v. Martindale*, 1 Harp. (S. C.) 133. But, where the cause of action arises after the intestate's death, it is considered as existing only from the time when there was some one capable of suing, and consequently, in that case, the statute does not begin to run until administration is granted. *Geigers v. Brown*, 4 McCord (S. C.), 423; *Fishwick v. Sewell*, 4 H. & J. (Md.) 399; *Aritt v. Elmore*, 2 Bailey (S. C.), 595; *Clark v. Hardeman*, 2 Leigh (Va.), 347.

² *Durore v. Jones*, 4 T. R. 300. Proceedings in bankruptcy under the Federal laws do not suspend the operation of the statute of limitation. It is well settled that the pendency of proceedings under the insolvent laws of a State does not suspend the operation of the statute of limitations upon debts which are provable in insolvency, since such proceedings do not prevent the creditor from bringing an action upon his debt. *Colleston v. Bailey*, 6 Gray (Mass.), 517; *Stoddard v. Doane*, 7 id. 387; *Richardson v. Thomas*, 13 id. 381. So it has been held that the representation of the estate of a deceased person

whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on one of those statutes, it would also on others. I am clearly of opinion, on the words of the statute of fines, and on the uniform construction of all the statutes of limitations down to the present moment, and the generally received opinion of the profession on the subject, that the question ought not to be disturbed." In some of our State courts, and in the United States court, an important exception to this rule has been adopted, which, although not within the letter, is perhaps within the spirit of the statutes of the several States and their saving clauses, which is, that the statute does not run during a period of civil war as to matters of controversy between citizens of the opposing belligerents;¹ but, as this exception is predicated upon the ground that the courts are not open to belligerents, it follows that it does not apply to questions arising between residents of the same State, or as to those who are not residents of either belligerent section.² The general rule is, that whatever the courts may think the legislature would have done if it had foreseen a certain contingency, nevertheless,

as insolvent and the appointment of commissioners does not suspend the operation of the statute limiting actions against administrators to two years from the time of their giving bonds. *Tarbell v. Parker*, 106 Mass. 347; *Richardson v. Allen*, 116 id. 447. The same principle applies to bankruptcy proceedings where the bankrupt law does not prohibit a creditor whose debt has not been proved from bringing an action against the bankrupt. Such statutes do not generally suspend the right of a creditor to commence an action, but only prevent him from prosecuting it to final judgment until the bankrupt has the opportunity to obtain his discharge. *Doe v. Irwin*, Mass. Sup. Ct. 1883.

¹ *Coleman v. Holmes*, 44 Ala. 124; *Adger v. Alston*, 15 Wall. (U. S.) 555; *Stewart v. Kohn*, 11 id. 493; *Brown v. Hiatt*, 15 id. 177; *Levy v. Stewart*, 11 id. 244; *Chappelle v. Olney*, 1 Sawyer (U. S. C. C.), 401. This applies to statutes relating to appeals also. *The Protector*, 9 Wall. (U. S.) 687. See, on general proposition, *Abrent v. Zaun*, 40 Wis. 622; *Jones v. Nelson*, 51 Ala. 471; *Johnston v. Gill*, 27 Gratt. (Va.) 587; *Edwards v. Jarvis*, 74 N. C. 315; *Hawkins v. Savage*, 75 id. 133. This doctrine, so far as it has grown up under acts of the legislatures in the States lately in rebellion suspending the statute during the civil conflict, is cor-

rect; but, independent of those acts or resolutions, there is no possible ground on which the doctrine could stand, except that the suspension is fairly implied from the emergency; and this latter position opens the door for a multitude of exceptions, and would seem to border largely on the usurpation of legislative powers by the courts, but with us, as will be seen from the case cited, the doctrine is too well established to be disturbed. *Semmes v. Hartford Ins. Co.*, 13 Wall. (U. S.) 158; *Wiggle v. Owens*, 45 Miss. 691; *McCutchen v. Dougherty*, 44 id. 419; *Coley v. Henry*, 42 Ga. 61; *Clipper v. Hutchinson*, 33 Tex. 120; *Bradford v. Shine*, 13 Fla. 393; *Kirkland v. Krebs*, 34 Md. 93; *Selden v. Preston*, 11 Bush (Ky.), 191; *Petzer v. Burns*, 7 W. Va. 63; *Ross v. Jones*, 22 Wall. (U. S.) 576; *McMerty v. Morrison*, 62 Mo. 140; *Gooding v. Varn*, Chase's Dec. (U. S. C. C.) 286; *Bell v. Hanks*, 57 Ga. 272; *Eddins v. Grady*, 28 Ark. 500; *Hall v. Denckler*, 29 id. 506; *Randolph v. Ward*, id. 238.

² *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *Smith v. Charter Oak Ins. Co.*, 64 Mo. 330. Nor does it apply to a mere personal trust, which could have been executed by the trustee without the intervention of the courts. *Mayo v. Cartwright*, 30 Ark. 407.

a case coming fairly within the limitation imposed by the statute cannot be excepted from its operation, unless it also comes fairly within the exceptions named therein.¹ In other words, the legislature makes the law and the courts apply it, and they cannot extend it to cases to which it does not apply, or except from its operation cases clearly coming within its provisions, and not excepted from its operation.² The suspension by implication, held by the courts to have been wrought during the late civil war, can only be justified upon the ground of paramount necessity, and can only be applied so far as such paramount necessity exists. Consequently, as to citizens of other States, as to whom the courts of the insurrectionary States were closed, such suspension, during such period,³ is held to have existed, upon the ground that, by a superior power, the creditor or party has been disabled to sue, without any default of his own, and therefore that none of the reasons which induced the enactment of these statutes apply while the actual disability so raised exist;⁴ and, so soon as the disability ceased, the suspension ceased;⁵ nor did it exist except as to the citizens of those States to whom such courts were closed.⁶

The rule as to disabilities is that, when the statute begins to run, it is not arrested by any subsequent disability, unless expressly so provided in the statute; and a person who claims the benefit of the general exceptions in the statute can only avail himself of such disabilities as existed when the right of action first accrued.⁷ Thus, the pendency of adminis-

¹ *The Sam Slick*, 2 Curtis (U. S. C. C.), 480.

In *Hill v. Suprs. Ren. Co.*, 119 N. Y. 344, 53 Hun (N. Y.), 194, in an action under the statute, to recover compensation for property destroyed in consequence of a mob or riot, it appeared that an action was begun in the county court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000; thereafter this action was commenced, but after the lapse of the statutory period. It was held that the action was not maintainable; that as it was brought under special law, and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action; and that the provision of the code providing that when an action is commenced within the time limited and is terminated "in any other manner than by

voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after," such termination, did not apply.

² *United States v. Maillard*, 4 Ben. (U. S. C. C.) 459; *Semmes v. Hartford Ins. Co.*, 18 Wall. (U. S.) 158.

³ *Coleman v. Holmes*, 44 Ala. 124; *Levy v. Stewart*, 11 Wall. (U. S.) 244; *Mixer v. Sibley*, 53 Ill. 61.

⁴ *Braun v. Sauerwein*, 10 Wall. (U. S.) 218; *Stiles v. Easley*, 57 Ill. 275.

⁵ *Stiles v. Easley*, *ante*; *Braun v. Sauerwein*, *ante*.

⁶ *Smith v. Charter Oak Ins. Co.*, 64 Mo. 330. But see *Ross v. Jones*, 22 Wall. (U. S.) 576, where it was held that the statute was suspended as to citizens of other of the rebel States, as well as to citizens of the loyal States.

⁷ *Hogan v. Kurtz*, 94 U. S. 773; *Hodges v. Dunden*, 51 Miss. 199; *Bozeman v. Browning*, 81 Ark. 364; *Watts v. Gunn*, 53 Miss. 502; *Hogg v. Ashman*, 83 Penn.

tration, and the inability of the heir to maintain an action to recover real estate by reason thereof, and the fact that the present right of action is in the administrator, does not constitute such a disability on the part of the heir, within the meaning of a statute which excepts from its operation persons under a disability when the right of action first accrues. The fact that the heir cannot sue because the right of action is, for the time being, vested in the administrator, does not constitute a disability; because the administrator in such cases is the trustee or representative of the heir, and not only is the exclusive right to bring an action vested in him, but the law also imposes upon him the duty to bring it, and if he fails to do so, whereby any right is lost to the heir, he is responsible therefor.¹ So, too, it is held that when the statute began to run during the life of the deviser, it is not arrested by any disability in the devisee;² so where it begins to run against the ancestor, it is not suspended by any statutory disability in the heir at the time of the descent cast.³

It may be stated, as the uniform result of the cases decided on the statute of limitations, that it does not deprive a party of his remedy, unless he has been guilty of the laches or default contemplated therein,⁴

St. 80; *Smith v. Newby*, 13 Mo. 159; *Pendergrast v. Foley*, 8 Ga. 1. See chapter on Disabilities in Personal Actions, *post*.

¹ *Meeks v. Vassault*, 8 Sawyer (U. S. C. C.) 206.

² *Bozeman v. Browning*, 81 Ark. 364.

³ *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 462.

⁴ In this connection it may be well to examine the early English cases arising under a statute similar to that existing in most of the States. In *Cary v. Stephenson*, 2 Salk. 421, C. was indebted to A., who died, and B. received the money, and afterwards the plaintiff's wife took out administration to A., and within six years after the grant of administration, but not within six years after the receipt of the money, the plaintiff sued B. for money had and received; it was held that the statute of limitations could be no bar to the action, because the plaintiff's title commenced by taking out the letters of administration. In that case the money was not received by the defendant until after the death of the intestate; but the court says the statute does not apply, proceeding on the ground that there were no laches on the part of the plaintiff, because there was there no cause of action until an administrator was appointed, when the

money became money received to his use.

In *Sanford's Case*, Cro. Jac. 61, it was held that where before the expiration of an existing term the grantee died, and at the expiration of the first term the lessor entered and levied a fine before administration granted, the administrator had five years to enter in, because, says the court, "no one had the right of entry before." This case arose under the statute of fines, 4 Henry VII. In *Wilcocks v. Huggins*, 2 Stra. 907, an action was brought on a promissory note dated July, 1719, by the executor of the executrix of G. W. The defendant pleaded that the action did not accrue within six years; the plaintiff replied, that the first executrix, in Trin. 11 Geo. I. (1725), sued out a bill of Middlesex against the defendant, returnable in the following Michaelmas Term, on which there was a continuance by *non misit breve*, and an *alias* taken out, returnable in Hilary Term following, before which the executrix died, and made the plaintiff her executor, who, in Michaelmas Term, 3 Geo. II., sued out a *latitat* against the defendant, on which he declared; concluding with an averment that the cause of action accrued within six years before suing out the first bill of Middlesex. There no reason whatever was shown for the de-

and that the statute, unless otherwise provided, applies only to a disability or disabilities existing at the time the right accrues, and that

lay of the four years between the first and the last writ: and therefore the court held the replication bad by reason of that unnecessary delay, saying "that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; but they would not go a moment further, for it would let in all the inconveniencies which the statute was made to avoid." And they added: "If, indeed, the second executor had been retarded by suits about the will or administration, and he had shown that in pleading it would have been otherwise, because then the neglect would have been accounted for." It was erroneously stated in that case that the longest time that had ever been allowed to an executor was a year: in *Lethbridge v. Chapman*, cited *Fitzg.* 171, there was an interval of fourteen months, yet the action was held in time. Other cases of the same class are collected in *Comyns' Digest*, Temps, G. 17. In *Hall v. Wybourn*, Carth. 136, to assumpsit for goods sold, the defendant pleaded *non assumpsit infra sex annos*. The plaintiff replied, that the defendant, at the time of the promise in the declaration mentioned, was resident in parts beyond the seas, and out of the allegiance of the king and queen, and there continued until, &c., on which day, and not before, he voluntarily returned into this realm; and that the plaintiff's bill was exhibited against him within a year after his return. It was held, on demurrer, that the replication was ill, on the ground that the plaintiff had neglected his proper remedy, by not filing an original and prosecuting the defendant to outlawry, which, though it should be reversed on his return, yet the plaintiff might then have brought another original by journeys' accounts, and thereby taken advantage of his first writ. In *Joliffe v. Pitt*, 2 Vern. 694, the plaintiff had lent W. a sum of money on a note dated in August, 1689, with interest at £1 per cent per month. W., then residing beyond seas, paid two years' interest, but then failed, and went to the East Indies, where he died

in February, 1706, having in the interval acquired considerable property, and made a will appointing the defendant Pitt his executor. In April, 1702, the plaintiff sued out a *latitat* against W., which was continued on the roll till 1706. In October, 1710, the defendant Pitt came over to England, and proved the will. In May, 1714, the plaintiff filed his bill against him and other creditors of W., for whom it was insisted that the plaintiff was barred by the statute of limitations. It is said to have been agreed that the plaintiff being abroad till 1702, and then suing out his writ, with continuances until the debtor's death, all that time was well excused; and also until his will was proved and there was an executor, since laches could not be attributed to the plaintiff for not suing, while there was no executor against whom he could bring his action; the only objection made on the defendant's part being, that the plaintiff ought to have revived the former action at law, and not have filed a bill in equity. LORD COWPER held that the statute did not apply, and decided in favor of the plaintiff. See *Granger v. George*, 5 B. & C. 149, 7 D. & R. 729; *Short v. McCarthy*, 3 B. & Ald. 626; *Howell v. Young*, 5 B. & C. 259. In *Murray v. East India Company*, 5 B. & Ald. 204, it was held that, in an action by an administrator on a bill of exchange payable to the intestate, but accepted after his death, the statute did not begin to run until administration granted. ABBOTT, C. J., says: "It cannot be said that a cause of action exists unless there be also a person in existence capable of suing." In this case Mr. Hope had despatched some bills to an agent in England, and himself embarked in a vessel for England; the vessel was lost, and he perished with it. His agent in England, acting under a power of attorney given by Mr. Hope before he died, presented the bills to the East India Company, and they were paid to the agent. It turned out that the agent had exceeded his authority in indorsing the bills; and it was held that the East India Company could not defend themselves against another action on the bills by the administrator of

no after-accruing disability will stop its operation.¹ The rule may be

Mr. Hope, on the ground that more than six years had elapsed since the date of the bills, because the right of action did not exist in the lifetime of Mr. Hope, therefore there was no power of bringing an action until administration was taken out: the action never accrued to anybody until the letters of administration were granted; from that time, therefore, according to the words of the statute, the statute began to run. *Skeffington v. Whitehurst*, 3 Y. & Col. 34. In *Webster v. Webster*, 10 Ves. 93, a plea of the statute was allowed, because LORD ELDON held the fair construction of the allegations in the bill to be, that the defendant had possessed himself of the personal estate of the debtor (in whose lifetime the debt had accrued), and might therefore have been sued within six years of the death as executor *de son tort*. In *Perry v. Jenkins*, 1 My. & C. 114, a suit for an account of rents had become abated by the plaintiff's death before decree, and his administrator more than six years afterwards filed a bill of revivor, to which the defendant pleaded the statute of limitations, but did not state in his plea that six years had elapsed since the representation taken out to the original plaintiff. The plea was overruled. In *Douglas v. Forrest*, 4 Bing. 686, it was held, that where the testator resided and died abroad, his executor in England might be sued at any time within six years after his taking out probate. In that case the debtor never returned from beyond seas; therefore the plaintiff might have sued him at any time during his life; and so might sue his executor at any time during six years after he was appointed executor. In *Durore v. Jones*, 4 T. R. 300, it was held that when once the five years allowed to an infant to make an entry for the purpose of avoiding a fine have begun, the time continues to run notwithstanding any subsequent disability; and ASHURST, J., there says: "If the disability be once removed, the time must continue to run notwithstanding any subsequent disability, either voluntary or involuntary; and even if there were any

distinction between the two kinds of disability, the present is against the plaintiff, for the imprisonment for debt was in consequence of his own voluntary act." LORD KENYON, C. J., in the same case, says: "I never heard it doubted, till the discussion of this case, whether, when the statutes of limitation had begun to run, a subsequent disability would stop their running." His lordship states that to be the uniform construction of the statutes, and the generally received opinion of the profession. There are indeed cases where the courts have refined for the purpose of holding that the statute has not begun to run, but none which break in on the principle thus stated by LORD KENYON. The statute of the 21 Jac. I. c. 16, itself, says nothing whatever about defendants, excepting in the clause giving a year after the reversal of an outlawry. The first case in which the construction of it came in question was *Prideaux v. Webber*, 1 Lev. 31, where it was held that a plea of the statute was a bar, notwithstanding a replication that when the cause of action accrued, rebels had usurped the government, and none of the king's courts were open: for there was no exception in the act of such a case. At the time of the Revolution, again, there was an interval during which the courts were not sitting; and an act of Parliament, the 1 W. & M. c. 4, was passed expressly to provide for the case; enacting that the time between the 10th of December, 1688, and the 12th of March following (a period of ninety-two days), should not be reckoned in *quare impedit* or the statute of limitations. If this time would have been left out of the computation on the true construction of the statute of James, no legislative provision of the kind would have been necessary. The next statute which passed relating to the subject was that of the 4 Anne, c. 16, prior to which there had been decisions on the statute of James, holding the exception in section 7 to apply only to the case of plaintiffs absent beyond seas. *Hall v. Wyburn*, Carth. 136; *Chevely v. Bond*, id. 226.

¹ *Jackson v. Johnson*, 5 Cow. (N. Y.) 40; *Demarest v. Wynkoop*, 3 Johns. Ch. 74; *Jackson v. Wheat*, 18 Johns. (N. Y.) 129.

illustrated thus: If a female, not of age when the title to land by descent accrues, should marry before she becomes of age, she would not be within the saving operation of the statute except so long as her infancy existed. When she became of full age she could not set up the coverture as an excuse for not having brought her action within the time limited by the statute; the statute having commenced to run before her coverture the latter could not be tacked to the former.¹

In the case last cited the statute provided that all appeals from a decree should be taken within two years from the time of the entry thereof. The decree appealed from was rendered on the 17th of April, 1878, and the appeal was not taken until the 6th of September, 1883. The appellant set up the disability of imprisonment as cause for the delay; this was held insufficient to excuse the delay and prevent the operation of the statute. BRADLEY, J., said: "As more than five years elapsed after the entry of the decree in this case before the appeal was taken, of course the appeal was barred by lapse of time unless the appellant was within one of these exceptions. He states in his petition of appeal, and the fact is not disputed, that being sued in the city of New York upon the decree appealed from, and judgment being rendered against him, his body was taken in execution, and on the 7th of February, 1879, he was thrown into the county jail of New York, where he has ever since remained, and is now kept in close confinement. As only ten months elapsed after the entry of the decree when the appellant was thrown into prison, and as he has been in prison ever since, he contends that two years, exclusive of the term of his imprisonment, had not expired when his appeal was taken."

This answer cannot avail the appellant if that construction be given to the statute which has almost uniformly been given to similar statutes in England and this country. The construction referred to is, that some or one of the disabilities mentioned in the proviso, must exist at the time the action accrues, in order to prevent the statute from running; and that after it has once commenced to run, no subsequent disability will interrupt it. This was the rule adopted in the exposition of the statute of 21 Jac. 1, c. 16, the English statute of limitations in force at the time of the first settlement of most of the American colonies. It is provided by the seventh section of that statute.

"That if any person entitled to bring any of the personal actions therein mentioned, shall be 'at the time of any such cause of action

Murray v. East India Company and Cary v. Stevenson show that no cause of action, within the meaning of the statute, accrues, until there is somebody capable of suing, and somebody capable of being sued; but if a cause of action has once accrued, it cannot be stopped, except in some one of the modes provided in the statute.

¹ The doctrine that no disability which did not exist at the time when the right of action accrued can be relied upon to avoid the operation of the statute, is well and ably discussed by MR. JUSTICE BRADLEY in McDonald v. Hovey, 110 U. S. 620.

given or accrued,' within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, such person shall be at liberty to bring the same actions within the times limited by the statute, after his disability has terminated."

It is true that the express words of this statute refer to disabilities existing "at the time" the cause of action accrues, and do not literally include disabilities arising afterwards. The courts, however, held that such was not only the literal, but the true and sensible meaning of the act; and that to allow successive disabilities to protract the right to sue would, in many cases, defeat its salutary object, and keep actions alive perhaps for a hundred years or more; that the object of the statute was to put an end to litigation, and to secure peace and repose; which would be greatly interfered with and often wholly subverted, if its operation were to be suspended by every subsequently accruing disability. A very exhaustive discussion of the subject had arisen in the time of Queen Elizabeth, in the case of *Stowell v. Zouch*,¹ in the construction of the statute of fines, passed in 4 Hen. 7, c. 24, which gave five years to persons not parties to the fine to prosecute their right to the land; but if they were women covert, or persons within the age of twenty-one years, in prison, or out of the realm, or not of whole mind at the time of the fine levied, they were allowed five years to prosecute their claim after the disability should cease. In that case, a person having a claim to land, died three years after a fine was levied upon it without commencing any suit, and leaving an infant heir; and it was held that the heir could not claim the benefit of his own infancy, but must commence his suit for the land within five years from the levying of the fine; because the limitation commenced to run against his ancestor, and having once commenced to run, the infancy of the heir did not stop it. The same construction was given, as already stated, to the general statute of limitations of 21 Jac. 1, before referred to. In an early English case,² LORD KENYON said:

"I confess I never heard it doubted until the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion on the words of the statute of fines, on the uniform construction of all the statutes of limitations down to the present moment (1791), and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine and make distinctions between the cases of voluntary and involuntary disabilities (as was attempted in that case); but in both cases, when the disability is once removed, the time begins to run."

To the same effect are *Doe v. Jesson*,³ and many cases in this coun-

¹ Plowd. 353 a.

² 6 East, 80.

³ *Doe v. Jones*, 4 T. R. 300.

try referred to in Angell on Limitations, *qua supra*, and in Wood on Limitations, sect. 251. In a case that came to this court from Kentucky, in 1816, CH. JUSTICE MARSHALL said :

“The counsel for the defendants in error have endeavored to maintain this opinion by a construction of the statute of limitations of Kentucky. They contend, that after the statute has begun to run, it stops, if the title passes to a person under any legal disability, and recommences after such disability shall be removed. This construction, in the opinion of this court, is not justified by the words of the statute. Its language does not vary essentially from the language of the statute of James, the construction of which has been well settled ; and it is to be construed as that statute, and all other acts of limitation founded on it, have been construed.”¹

And in the subsequent case of *Mercer's Lessee v. Seldon*,² the court took the same view in a case arising in the State of Virginia, in which the right of action accrued to one Jane Page, an infant within the exception of the statute ; and it was insisted that her marriage before she was twenty-one added to her first disability (of infancy) that of coverture. But the court held otherwise, and decided that only the period of infancy, and not that of coverture, could be added to the time allowed for bringing the action. The same doctrine was held in the cases cited below.³

In most of the State statutes of limitation the clauses of exception or provisos in favor of persons laboring under disabilities employ terms equivalent to those used in the English statute, expressly limiting the exception to cases of disability existing when the cause of action accrues. But this is not always the case. The statutes of New York in force prior to the Revised Statutes limited the time for bringing real actions to twenty-five years after seisin or possession had, and the proviso in favor of persons laboring under disabilities was in these words : —

“Provided always, That no part of the time during which the plaintiff, or person making avowry or cognizance, shall have been within the age of twenty-one years, insane, *feme covert*, or imprisoned, shall be taken as a part of the said limitation of twenty-five years.”⁴

It will be observed that this proviso is stronger in favor of cumulative and subsequently accruing disabilities than that of the act of Congress which we are now considering ; yet the Supreme Court of New York, and subsequently this court, gave it the same construction in reference to such disabilities as has always been given to the English statute of

¹ *Walden v. Gratz's Heirs*, 1 Wheat. U. S.) 292.

² 1 How. (U. S.) 37, 51.

³ *Eager v. Commonwealth*, 4 Mass. 182 ; *Fitzhugh v. Anderson*, 2 Hen. and Mun. 306 ; *Parsons v. McCracken*, 9

Leigh, 495 ; *Demarest v. Wynkoop*, 3 Johns. Ch. 129 ; *Bunce v. Wolcott*, 2 Conn. 27.

⁴ 1 Rev. Laws, 1813, p. 185, sec. 2 ; 2 Greenleaf's Laws, 95, sec. 6.

finer and statute of limitations. In the case of *Bradstreet v. Clarke*,¹ which was a writ of right, and was argued by the most eminent counsel of the State, it was strenuously contended that the proviso referred to, being different from that of the English statutes in not referring to disabilities existing when the cause of action accrued, a different construction ought to be given to it, and the disabilities named, though commencing subsequently, and even after the statute began to run, ought to be held to interrupt it. The court, however, did not concur in this view, but held that the coverture of the demandant occurring after the statute began to run could not be set up against its operation. MR. JUSTICE SUTHERLAND said:—

“It is believed that the same construction has uniformly been given to this proviso in this respect as to that in relation to possessory actions (contained in a different section of the act), that where the statute has once begun to run a subsequently accruing disability will not impede or suspend it.”

Although the case did not finally turn on this point, the attention given to it by counsel and the apparent unanimity of the court, then consisting of SAVAGE, CHIEF JUSTICE, and SUTHERLAND and NELSON, JUSTICES, gave to that opinion a great deal of weight.

The same question afterwards arose in this court in the case of *Thorp v. Raymond*.² That was an action of ejectment, used in place of a writ of right, to try the title to lands in New York. The plaintiff's grandmother acquired a right of entry to the lands in 1801, but was then insane, and remained so till her death in 1822. Her only daughter, and heir, was a married woman, and remained such till the death of her husband in 1832. The action was not commenced until 1850. The plaintiff contended that, under the proviso referred to, the daughter's disability of coverture ought to be added to the mother's disability of insanity; and that this would save the action from the bar of the statute, whether under the limitation of twenty-five years or that of twenty years. But the court held that the disabilities could not be connected in this way. MR. JUSTICE NELSON, delivering the opinion, and having shown that the proposed cumulation was inadmissible under the third section of the act, considering the action as one of ejectment, disposed of the other view as follows:—

“But it is supposed that the saving clause in the second section of this act, which prescribes a limitation of twenty-five years as a bar to a writ of right, is different, and allows cumulative disabilities; and as ejectment is a substituted remedy in the court below for the writ of right, it is claimed the defendant is bound to make out an adverse possession of twenty-five years, deducting successive or cumulative disabilities. This, however, is a mistake. The saving clause in this second section, though somewhat different in phraseology, has received

¹ 12 Wend. 602.

² 16 How. U. S. 247.

the same construction in the courts of New York as that given to the third section." (Citing the case of *Bradstreet v. Clarke*, in the decision of which the learned justice had participated.)

The statute of limitations of Texas is another instance in which language is used quite different from that of the English statute. After prescribing various limitations, the eleventh section provides for disabilities, as follows:—

"No law of limitations, except in the cases provided for in the eighth section of this act, shall run against infants, married women, persons imprisoned, or persons of unsound mind, during the existence of their respective disabilities; and when the law of limitations did not commence to run prior to the existence of these disabilities, such persons shall have the same time allowed them after their removal that is allowed to others by this and other laws of limitations now in force." Oldham & White, art. 1352.

According to the literal sense of this section, if one disability should prevent the statute from running until another supervened, the latter would be equally effectual to interrupt it. But the Supreme Court of Texas, in *White v. Latimer*,¹ held otherwise, and decided that one disability cannot be tacked on to another; but that the long-established rule in construing statutes of limitations must be applied. The court say:—

"The 11th section of the statute is not in its terms materially different from the exception contained in the statute of James, and cannot claim a different construction from that; and a departure from the rule so long and well established, that it applies to the particular disability existing at the time the right of action accrued, would introduce the evil so strongly deprecated by the most eminent English and American judges, of postponing actions for the trial of rights of property to an indefinite period of time, by the shifting of disabilities, from infancy to coverture, and again from coverture to infancy, an evil destructive of the best interests of society, and forbidden by the most sound and imperious policy of the age."

The authority of these cases goes far to decide the one before us. The proviso in the New York statute certainly was more general in its terms in describing the disabilities which would stay the operation of the statutes—described them more independently of the time when the cause of action accrued—than the act of Congress under consideration; and the courts, in giving it the construction they did, seemed to be largely influenced by the established interpretation given to similar statutes in *pari materia*, without having in the statute construed any express words to require such a construction. But in the case before us, the fair meaning of the *words* leads to the same result. The language is as follows:—

"No judgment, decree, or order . . . shall be reviewed in the

¹ 12 Tex. 61.

Supreme Court, . . . unless the writ of error is brought or the appeal is taken within two years after the entry of such judgment, decree, or order: Provided, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted or such an appeal may be taken within two years after the judgment, decree, or order, exclusive of the term of such disability."

"*Is an infant,*" when? "*Is an insane person, or imprisoned,*" when? Evidently, when the judgment, decree, or order is entered. That is the point of time to which the attention is directed. The evident meaning is, that if the party is an infant, insane, or in prison when the judgment or decree is entered, and therefore when he or she becomes entitled to the writ of error or appeal, the time to take it is extended. In all the old statutes this was expressed in some form or other; this was their settled meaning. It will also be deemed to be the meaning of this statute unless its language clearly calls for a different meaning. But, as seen, it does not.

Section 1008 of the Revised Statutes was taken directly from the "Act to further the administration of justice," approved June 1, 1872, and is a mere transcript from the second section of that act. 17 Stat. 196. But this was a revision of the twenty-second section of the Judiciary Act of 1789, and if we turn back to that section we shall find that, with regard to the point under consideration, its language was, in effect, substantially the same as that of the present law. It was as follows: —

"Writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability."

"*Be an infant,*" when? "*Be a feme covert, non covert, non compos, or imprisoned,*" when? The same answer must be given as before, namely, when he or she becomes entitled; that is, when the judgment or decree is entered.

The phraseology of the act of 1872, and of section 1008 of the Revised Statutes, is so nearly identical with that of the twenty-second section of the act of 1789, in reference to the point under consideration, that we must presume that they were intended to have the same construction, and the act of 1789 contains no language which requires that it should have a different construction from that which had long been established in reference to all the statutes of limitation then known, whether in the mother country or in this. On the contrary, as we have seen, the terms of the act of 1789 fairly call for the same construction which had for centuries prevailed in reference to those statutes.

It is a received canon of construction, acquiesced in by this

court, "That where the English statutes — such, for instance, as the statute of frauds and the statute of limitations — have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority."¹

And even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. CHIEF JUSTICE GREEN said: —

"Where two or more statutes, whose construction has been long settled, are consolidated into one, without any change of phraseology, the same construction ought to be put upon the consolidated act as was given to the original statutes. A different construction ought not to be adopted if thereby the policy of the act is subverted or its material provisions defeated."²

So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology, — some change other than what may have been necessary to abbreviate the form of the law. As said by the New York Court for the Correction of Errors: ³ —

"Where the law antecedently to the revision was settled, either by clear expressions in the statutes or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of law, unless such phraseology evidently purports an intention in the legislature to work a change."⁴

So the supreme court of Alabama has held that the legislature of that State, in adopting the code, must be presumed to have known the judicial construction which had been placed on the former statutes; and, therefore, the re-enactment in the code of provisions substantially the same as those contained in a former statute is a legislative adoption of their known judicial construction.⁵

"A change of phraseology in a revision will not be regarded as altering the law where it had been well settled by plain language in the

¹ *Pennock v. Dialogue*, 2 Pet. 1, 18; Smith's Commentaries on Stat. and Const. Law, sec. 634; Sedgwick on Construction of Stat. and Const. Law, 363.

² *In re Murphy*, 3 Zab. 180.

³ *Taylor v. Delancey*, 2 Caines's Case, 143, 150.

⁴ And see *Yates's Case*, 4 Johns. 317; *Theriat v. Hart*, 2 Hill, 380; *Parmelee v.*

Thompson, 7 Hill, 77; *Goddell v. Jackson*, 20 Johns. 693; *Croswell v. Crane*, 7 Barb. 191. "The construction will not be changed by such alterations as are merely designed to render the provisions more precise." *Mooers v. Bunker*, 29 N. H. 421.

⁵ *Duramus v. Harrison*, 26 Ala. 326.

statutes, or by judicial construction thereof, unless it is clear that such was the intent.”¹

Of course a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law.²

In view of these authorities and of the principles involved in them, and from a careful consideration of the language of the law itself, we are satisfied that it was not the intention of Congress, either in the twenty-second section of the act of 1789, or in the second section of the act of 1872, or in section 1008 of the Revised Statutes, to change the rule which has always, from the time of Henry VII., been applied to statutes of limitation, namely, the rule that no disability will postpone the operation of the statute unless it exists when the cause of action accrues; and that when the statute begins to run no subsequent disability will interrupt it.

This conclusion disposes of the case. As the appellant was free from any disability for several months after the entry of the decree appealed from, the statute commenced to run at that time, and, therefore, the time for taking the appeal expired several years before it was actually taken.

The doctrine held in this case is so thoroughly established by the decisions of the courts, not only in England but also in this country, as to hardly need the citation of an authority in its support. The cases holding the doctrine are very numerous.³ But if at the time when the right accrued a party is under two or more disabilities, as if she is a married woman, an infant, and insane, she may avail herself of either

¹ Sedgwick on Construction (2d ed.), 229, note. Referring to *Hughes v. Farrar*, 45 Me. 72; *Burnham v. Stevens*, 33 N. H. 247; *Overfield v. Sutton*, 1 Met. (Ky.) 621; *McNamara v. Minnesota Central Railway Company*, 12 Minn. 388; *Conger v. Barker*, 11 Ohio St. 1.

² *Young v. Dake*, 1 Seld. (N. Y.) 463.

³ *Swearingen v. Robertson*, 39 Wis. 462; *Jones v. Lemon*, 26 W. Va. 629; *Handy v. Smith*, 30 W. Va. 195; *Wilson v. Harper*, 25 W. Va. 179; *Hogan v. Kurtz*, 94 U. S. 773; *Dowell v. Tucker*, 46 Ark. 438; *McLeran v. Benton*, 73 Cal. 329; *Doyle v. Wade*, 23 Fla. 90; *Wade v. Doyle*, 17 Fla. 522; *Downing v. Ford*, 9 Dana (Ky.), 391; *Riggs v. Dooley*, 7 B. Mon. (Ky.) 236; *Clark v. Jones*, 16 B. Mon. (Ky.) 121; *Scott v. Haddock*, 11 Ga. 258; *Everett v. Whitfield*, 27 Ga. 133; *Millington v. Hill*, 47 Ark. 301; *Kistler v. Hereth*, 75 Ind. 177; *Clark v.*

Frail, 1 Met. (Ky.) 35; *Blackwell v. Bragg*, 78 Va. 529; *Grimes v. Watkins*, 59 Tex. 133; *Grigsby v. Peck*, 57 Tex. 142; *Becton v. Alexander*, 27 Tex. 659; *Marsteller v. Marsteller*, 93 Penn. St. 350; *Hollingshead's Appeal*, 103 Penn. St. 158; *Arnole's Appeal*, 115 Penn. St. 356; *Douglas v. Irvine*, 126 Penn. St. 643; *Keiser's Appeal*, 124 Penn. St. 80; *Cozzens v. Franman*, 30 Ohio St. 491; *Hinde v. Whiting*, 31 Ohio St. 53; *Oliver v. Pullan*, 24 Fed. Rep. 127; *Rogers v. Brown*, 61 Mo. 187; *Billon v. Larimore*, 37 Mo. 375; *Campbell v. Laclede Gas Co.*, 84 Mo. 352; see also same case affirming the decision of the State court, 119 U. S. 445; *North v. James*, 61 Miss. 761; *Hodges v. Darden*, 51 id. 199; *Watts v. Gunn*, 53 id. 502; *Tippin v. Coleman*, 61 id. 516; *Trafton v. Hill*, 80 Me. 503; *Bonney v. Stoughton*, 122 Ill. 536; *Keil v. Healey*, 84 Ill. 104; *Fritz v. Joiner*, 54 Ill. 101.

of them, and, in the language of EDMOND, J.,¹ "it will always be an answer to an objector to such an election to say, the disability on which I rely is pointed out by the proviso; it existed at the time my right or title accrued; I have prosecuted my claim within the time allowed after its discontinuance, and come within both the letter and the spirit of the law. But," he adds, "where a single disability only exists at the time the right accrues, and the five years after the discontinuance of that disability have elapsed, the statute immediately attaches, and the party so neglecting to prosecute can never avail himself of any other or super-venient disability, because the statute recognizes no other than such as actually existed, or should exist, when the right first commenced, and every after disability may be said to want, and is, in fact, destitute of that essential qualification." In an English case,² LORD HARDWICKE, in commenting upon the effect of several coexisting disabilities in one person, said: "If a man both of non-sane memory and out of the kingdom come into the kingdom, and then go out of the kingdom, — his non-sane memory continuing, — his privilege as to his being out of the kingdom is gone; and his privilege as to non-sane memory will begin from the time he returns to his senses."³ Where a cause of action accrues in favor of the estate of a deceased person, as where by statute a right of action is given to an executor or administrator of a person killed by the negligence of a corporation, it is held that the cause of action is not complete, and consequently does not arise, until an executor or administrator is appointed, so that the statute of limitations does not begin to run until such appointment is made.⁴

SEC. 7. The Bar of the Statute must be interposed by the Debtor. — Another general rule of great practical importance is, that the bar of the statute must be interposed by the diligence of the debtor, and as early

¹ *Bunce v. Wolcott*, 2 Conn. 34. See also *Davis v. Cooke*, 3 Hawks (N. C.), 608; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Smith v. Burtis*, 9 Johns. (N. Y.) 174; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 182; *Wilson v. Betts*, 4 Den. (N. Y.) 20; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74.

Blackwell v. Bragg, 78 Va. 529; *North v. James*, 61 Miss. 761; *Sims v. Bardoner*, 86 Ind. 87; *Sims v. Everhardt*, 102 U. S. 300. Of course it will be understood that all disabilities which save the operation of the statute of limitations are those which are created by the statute itself; and unless the statute makes a certain disability a cause for suspending the operation of the statute, there can be no suspension, however great may be the hardships which ensue. In all its aspects and operations

the statute is arbitrary. *Forster v. Patterson*, 17 Ch. Div. 132; *Kinsman v. Rouse*, 17 id. 104; *Jones v. Lemon*, 26 W. Va. 629; *Amy v. Watertown*, 130 U. S. 320; *Rowell v. Patteson*, 76 Me. 196; *Bickle v. Chrisman*, 76 Va. 678; *Fairbanks v. Long*, 91 Mo. 628; *In re Griffith*, 35 Kan. 377; *Chicago, &c. R. R. Co. v. Jenkins*, 103 Ill. 588; *Miller v. Lesser*, 71 Iowa, 147; *State v. Pasey*, 82 Ind. 543; *Kendall v. United States*, 107 U. S. 123.

² *Start v. Mellish*, Atk. 610.

³ *Butler v. Howe*, 13 Me. 397; *Keeton v. Keeton*, 20 Mo. 530; *Jordan v. Thornton*, 7 Ga. 517; *Demarest v. Wynkoop ante*.

⁴ *Andrews v. Hartford, &c. R. R. Co.*, 34 Conn. 57; *Hobart v. Conn. Turnpike Co.*, 15 Conn. 145.

as possible,¹ and usually, unless otherwise provided by statute, on the pleadings previously to the hearing, and that it will not be raised by the court unsolicited;² and, also, that the protection afforded by the

¹ In France, the objection may be taken at any stage of the proceedings. Code Civil, 2224. And such also is the provision in Louisiana. 4 Griffith's Annual Law Reg. 686. But generally in this country it must be interposed at the earliest opportunity. *McIver v. Moore*, 1 Cranch (U. S.), 90; *Wilson v. Tubervine*, id. 492; *Marsteller v. McLean*, id. 55; *Thompson v. Affick*, 2 id. 46; *Beatty v. Van Ness*, id. 67. If, however, a new declaration or complaint is filed, setting up a new cause of action, the statute runs until such new declaration is filed, and may be pleaded thereto. *Holmes v. Trout*, 7 Pet. (U. S.) 171; *Miller v. McIntyre*, 6 id. 61. And if new parties are brought in as defendants, the statute runs as to them until they are actually cited in, and they may plead it, although, as to the original defendants, it has not run. *Alexander v. Pendleton*, 8 Cranch (U. S.), 462; *Miller v. McIntyre*, *ante*. And the same rule has been applied where the declaration in an action of ejectment has been amended by adding a new demise in the name of another party asserting a different title. *Sicard v. Davis*, 6 Pet. (U. S.) 124. In an early English case it was held that the statute was an absolute bar to a claim upon which it had run, and consequently that it operated as a bar to an action by its own force, and without being pleaded. *Brown v. Hancock*, Cro. Car. 115. But the question coming before the court soon afterwards, the judges were equally divided on the question. *Frankersley v. Robinson*, id. 163. And still later it became well settled that a person could not avail himself of the statute unless he set it up by plea. *Puckel v. Moore*, Vent. 191; *Gould v. Johnson*, 2 Ld. Raym. 838; *Kirkman v. Siboni*, 4 M. & W. 339; *Brickett v. Davis*, 21 Pick. (Mass.) 404; *Robbins v. Harvey*, 5 Conn. 335; *Pegram v. Staltz*, 67 N. C. 144; *Pearsall v. Dwight*, 2 Mass. 87; *Chambers v. Chambers*, 4 G. & J. (Md.) 349; *Parker v. Irwin*, 47 Ga. 405; *Merryman v. State*, 5 H. & J. (Md.) 425; *Jackson v. Varick*, 2 Wend. (N. Y.) 294. And even in those States where it is held

that a person may avail himself of the statute by demurrer, it is held that, unless the bar appears from the declaration, the statute must be pleaded. *Davenport v. Short*, 17 Minn. 24; *Frosh v. Sweet*, 2 Tex. 485; *Sturges v. Burton*, 8 Ohio St. 215; *Lewis v. Alexander*, 51 Tex. 578. That the statute must be pleaded, see *Capen v. Woodrow*, 51 Vt. 106; *Hines v. Potts*, 56 Miss. 346. But it has been held that in actions against the government, under a statute authorizing a claimant to sue it if his action was brought within six years from the time the right of action accrued, the courts were bound to take notice of the statute, and that the statute itself in such cases is in effect a plea of the statute of which the courts are bound to take notice. But in such cases it will be observed that the statute confers the right of action and subjects the right to a condition, viz. that suit shall be brought within a certain time; and, unless the condition is not complied with, the right does not exist. *Kendall v. United States*, 14 Ct. of Cl. (U. S.) 122.

² To be available, the statute must be pleaded or interposed as a bar by answer, where such practice prevails, or by notice under the general issue; and the proper plea, where the statute is interposed to bar an action upon a simple contract, is *non accrevit infra sex annos*. *Parker v. Kane*, 4 Wis. 1; *Peck v. Cheney*, id. 249; *Humphrey v. Persons*, 23 Barb. (N. Y.) 313; *Young v. Epperson*, 14 Tex. 618; *Tazewell v. Whittle*, 13 Gratt. (Va.) 329; *Havlin v. Stevenson*, 30 Iowa, 371; *Offut v. Henderson*, 1 Cr. (U. S. C. C.) 553; *The Swallow, Olc.* (U. S.) 334; *Neale v. Walker*, 1 Cr. (U. S. C. C.) 57; *McIver v. Moore*, id. 90; *Gardner v. Lindo*, id. 78; *Rivers v. Washington*, 34 Tex. 267; *Robbins v. Harvey*, 5 Conn. 335; *Pegram v. Stoltz*, 67 N. C. 144; *Wisecarver v. Kincaid*, 83 Penn. St. 100; *Parker v. Irwin*, 47 Ga. 405; *Robinson v. Allen*, 37 Iowa, 27; *Tarbox v. Adams County*, 34 Wis. 558. In *Retzer v. Wood*, U. S. S. C., Nov., 1883, it was held that in the absence of a statutory rule to the contrary,

statute may be waived by the debtor, the best possible proof of such waiver being a payment. It is probable, however, that this rule is applicable solely to cases where by the statute the remedy only, not the right, is destroyed.¹

the defence of a statute of limitations, which is not raised either in pleading, or on the trial, or before judgment, cannot be availed of. In a suit to recover back internal revenue taxes, tried by the Circuit Court without a jury, the court having found the facts, and held that the taxes were illegally exacted, but that the suit was barred by a statute of limitation, rendered a judgment for the defendant. On a writ of error by the plaintiff, the record not showing that the question as to the statute of limitations was raised by the pleadings, or on the trial, or before judgment, and the conclusion of law as to the illegality of the taxes being upheld, the court reversed the judgment and directed a judgment for the plaintiff to be entered below. *Storm v. United States*, 94 U. S. 76; *Upton v. McLaughlin*, 105 id. 640. In New York, under the code, the statute must be set up by way of answer. *Sands v. St. John*, 36 Barb. (N. Y.) 628; *Bihrin v. Bihrin*, 17 Abb. Pr. (N. Y.) 19; *Cotton v. Manurer*, 3 Hun (N. Y.), 552. And the plaintiff cannot avail himself of the statute against a counter-claim unless he replies the statute thereto. *Clinton v. Eddy*, 1 Lans. (N. Y.) 61. But he may interpose the statute against a set-off not the subject of counter-claim, although it is not specially pleaded. *Mann v. Palmer*, 2 Keyes (N. Y.), 177; *Jacks v. Moore*, 1 Yeates (Penn.), 391. In Kentucky, under the code, matters in avoidance of a plea of the statute need not be pleaded, but may be proved. *Harris v. Moberly*, 5 Bush (Ky.), 556. In all cases, unless otherwise provided by statute, the statute of limitations must be specially pleaded, or it is treated as waived. *Bordens v. Murphy*, 78 Ill. 81; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Sears v. Shafer*, 6 N. Y. 268; *Fairchild's Case*, 24 Wend. (N. Y.) 381; *Boggs v. Bard*, 2 Rawle (Penn.), 102; *Heath v. Page*, 48 Penn. St. 130; *Gullick v. Loder*, 2 N. J. Eq. 68. And when the statute is pleaded, the plaintiff must reply specially. *Webster v. Newbold*,

41 Penn. St. 482; *Brand v. Longstreet*, 4 N. J. L. 325; *Crosby v. Stone*, 2 id. 988. In Minnesota, the statute must be pleaded, unless the complaint on its face clearly shows that it has run. *Davenport v. Short*, 17 Minn. 24. In Arkansas, while under the Code, § 111, it is optional with a party, where the claim appears to be barred, upon the face of the declaration or complaint, to set up the statute either by demurrer or answer, yet if the complaint shows on its face that the claim is not barred when it in fact is, the defence can only be made by answer. *McGehee v. Blackwell*, 28 Ark. 27. In some of the States it is held that, where the plaintiff's pleadings show on their face that his demand is barred by statute, a demurrer showing the fact can be interposed. *Hudson v. Wheeler*, 34 Tex. 356. But the bar of the statute must appear affirmatively from the plaintiff's pleadings. *Moulton v. Walsh*, 30 Iowa, 361. And the statute can never be interposed by a general demurrer. *Rivers v. Washington*, *ante*. In Ohio, where the bar of the statute appears upon the face of the complaint, advantage of it may be taken by demurrer; but the demurrer is waived by a subsequent answer to the merits. *Vose v. Woodford*, 29 Ohio St. 245; *Collins v. Mack*, 31 Ark. 684. In North Carolina, advantage of the statute cannot be taken by demurrer, but must be set up in the answer. *Green v. N. C. R. R. Co.*, 73 N. C. 524.

¹ In *Perkins v. Guy*, 55 Miss. 153, it was held that the statute of the *locus contractus* could not be pleaded in bar in a foreign jurisdiction, where both parties were resident in the place where the contract was made, during the whole statutory time, unless such statute goes to the extinction of the right itself, rather than to the extinction of the remedy. But that, where the right of action is extinguished by the statute of the *locus contractus*, effect will be given thereto by the *lex fori*. In Iowa, by statute, the statute of limitations of another State is a bar to an action upon

Not only must the statute be pleaded, but also, when it is set up in bar of the action, the plaintiff must reply thereto, and set up such matters as he relies upon in avoidance of its operation,¹ and in such a manner as to apprise the defendant of the issue intended to be raised, whether of denial or avoidance;² and the plaintiff will be precluded from giving any matter in evidence to avoid the statute, not specially embraced in his plea. Thus, under a replication that the defendant did assume and promise within six years, it has been held that the plaintiff could not show that the defendant had promised not to plead the statute.³ So where a defendant, in his answer, instead of alleging that the cause of action did not accrue within the prescribed period before the commencement of the action, alleged that he did not at any time within the prescribed period before the commencement of the action undertake, promise, or agree, &c., it was held insufficient to interpose the bar of the statute.⁴ And the same is true as to fraud, absence from the State, or indeed any matter that goes in avoidance of the statutory bar.⁵ Where a right is not of common law origin, but is given by statute and the statute also prescribes the time within which the right must be enforced, a complaint which on its face shows that the time limited has expired will be insufficient on demurrer.⁶ But, where the statute merely

the claim in that State. *Davis v. Harper*, 48 Iowa, 513. In *Gans v. Frank*, 36 Barb. (N. Y.) 320, a doctrine similar to that held in the Mississippi case, *supra*, was held.

¹ *Crosby v. Stone*, 2 N. J. L. 988; *Van Dike v. Van Dike*, 4 N. J. Eq. 289; *Jarvis v. Pike*, 11 Abb. Pr. (N. Y.) n. s. 398; *Ford v. Babcock*, 2 Sandf. (N. Y. S. C.) 518; *Witherup v. Hill*, 9 S. & R. (Penn.) 11; *Webster v. Newbold*, 41 Penn. St. 482; *McKelvey's Appeal*, 72 id. 409.

In *Jex v. Mayor, &c. of City of N. Y.*, 111 N. Y. 389, it was held that the six years' statute of limitation applies to a cause of action to recover back the amount of an assessment for a local improvement paid to the city of New York, where the assessment was void for want of jurisdiction; and it is wholly unnecessary in such a case to set aside the assessment, the cause of action is one of a legal nature only.

In pleading the statute, it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter, to pay the claim

after presentation and during which time the claimant is prohibited from bringing suit, has also elapsed.

Diefenthaler v. Mayor, &c., 111 N. Y. 831.

² *Jarvis v. Pike, ante*. The plea must be interposed before issue is joined, and this is the case even when a matter is referred. But if matters are brought up by the plaintiff, of which the defendant first had notice on the trial before a referee or auditor, to such matters the plea may then be interposed, either orally or in writing, by leave of the referee or auditor. When a defendant sets up a counter-claim, the plaintiff must plead the statute thereto, and cannot for the first time set it up before the referee, and the referee has no power to authorize the filing of such a plea. *Ripley v. Corwin*, 17 Hun (N. Y.), 597.

³ *McCulloch v. Norris*, 5 Penn. St. 285.

⁴ *McCollister v. Willey*, 52 Ind. 382.

⁵ *Bevan v. Cullen*, 7 Penn. St. 281; *King v. Baxter*, 7 Phila. (Penn.) 186. See *post*, PLEADINGS.

⁶ *Laird v. Laird*, 30 Md. 171.

bars the remedy upon a right which exists at the common law, the statute must be pleaded.¹

In some of the States it is held, that when the complaint on its face shows that the statute has run, it may be availed of by demurrer.² In Iowa, it was held, that the defence of the statute cannot be raised by demurrer.³ In Alabama, it is held, that when the bill or complaint seeks to enforce a claim which on its face is barred by the statute of limitations, but avers partial payments which avoid the bar, the defence of the statute cannot be taken by demurrer.⁴ And there would seem to be no good reason why this rule should not be universal; but if no demurrer is filed, and no plea setting up the statute, it cannot be availed of as a defence,⁵ as only those pleading the statute can avail themselves of it in defence.⁶ In Georgia, it is held, that where it is apparent from the face of the declaration that the suit is barred by the statute, it will be dismissed on motion. As the statute is a purely personal privilege, it follows, as a matter of course, that no one can avail themselves of that privilege except the person who elects so to do by setting up the statute as a defence; and the court cannot of its own motion interpose a plea of the statute.⁷ But the rule that the statute must be pleaded applies only where there is an opportunity to plead it.⁸ And the court may, in its discretion, allow an amendment setting up the statute as a defence.⁹ But as there is serious danger

¹ *Cooke v. Chambers*, 67 Ind. 107.

² *Wilt v. Buchtel*, 2 Wash. (U.S.), 417; *Thompson v. Parker*, 68 Ala. 387; *Devor v. Rerick*, 87 Ind. 337; *Budd v. Walker*, 29 Hun N. Y.), 344; *Ilett v. Collins*, 103 Ill. 74; *Upton v. Steele*, 2 Wy. 54; *Upton v. Mason*, 2 id. 55; *St. Louis, &c. R. R. Co. v. Brown*, 4 S. W. (Ark.) 781.

³ *State v. McIntyre*, 58 Iowa, 72. See also *State v. Spencer*, 70 Mo. 314.

⁴ *Cameron v. Cameron*, 82 Ala. 392; *Manning v. Dallas*, 15 Pac. Rep. (Cal.) 34; *Walker v. Flemming*, 37 Kan. 171; *Hefernan v. Howell*, 90 Mo. 344.

⁵ *Bannon v. Lloyd*, 64 Md. 48; *Cotherman v. Cotherman*, 58 Mich. 465; *Ward v. Walkers*, 63 Wis. 39; *Cooksey v. R. R. Co.*, 17 Mo. App. 172; *Childress v. Grim*, 57 Tex. 56; *Bellville Savings Bank v. Winslow*, 30 Fed. Rep. 488; *Sanger v. Nightengale*, 122 U. S. 176.

⁶ *Bannon v. Lloyd*, *ante*; *Bridgforth v. Payne*, 62 Miss. 777.

In this case it was also held that a defendant, having relied on the statute not

applicable, cannot have the benefit of one not pleaded.

⁷ *Smith v. Hutchinson*, 78 Va. 683. *Sanger v. Nightengale*, 122 U. S. 176; *Ewell v. Daggs*, 108 U. S. 143. In this case the court said that, although a subsequent purchaser might set up a plea of the statute, the plea must show that the action is barred as between the parties to the debt, because as the owner of the equity of redemption it is that debt he has to pay. The statute does not operate as a discharge of the debt, but operates as a mere limitation upon the remedy preventing the creditor from enforcing his claim after the statutory period has elapsed, provided the debtor sees fit to avail himself of it. The statute does not destroy the right of action, but only defeats a remedy for the enforcement of the claim. *Harris v. Gray*, 49 Ga. 585; *Parker v. Erwin*, 47 Ga. 2; *Baker v. Bush*, 25 Ga. 594; *George v. Gardiner*, 49 Ga. 491.

⁸ *Dreutzer v. Baker*, 60 Wis. 179.

⁹ *Smith v. Dreigert*, 61 Wis. 222.

that the exercise of this discretion may be abused, the courts will only exercise it in extreme cases.¹

In the case last cited it was held, that where a person pleads the statute by way of defence, he must be presumed to intend to plead the statute applicable to his case. But in a case cited from Mississippi,² it was held, that where a defendant relied on a statute not applicable, he cannot have the benefit of one not pleaded which might be applicable.

SEC. 8. The Law of Limitations a Part of the Lex Fori. — It is a well-settled rule, that personal contracts are to be interpreted by the law of the place where they are made; and it is a rule equally well settled, that remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, and not by the law of the place of the contract. The reason of this rule, according to STORY, J.,³ is obvious. “Courts of law,” says he, “are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order from mere comity to any foreign nation. As a rule, statutes of limitation are to be considered to fall within these remarks. They go *ad litis ordinationem*, not *ad litis decisionem*. In cases, therefore (except where provision is otherwise made by statute), where an action is brought in one country or State upon a contract made in another, a plea of the statute of limitations existing in the place of contracts is not a good bar, but a plea of the statute existing in the country or State where the action is brought, is.”⁴ This rule is in conformity with the universal

¹ Morgan v. Bishop, 61 Wis. 407.

² Bridgforth v. Payne, 62 Miss. 777.

³ In Le Roy v. Crowningshield, 2 Mas. (U. S.) 151.

⁴ In Duplex v. De Roven, 2 Vern. 540, is to be found the first authority that statutes of limitation go *ad litis ordinationem* and not *ad litis decisionem*. In that case, a bill in equity for discovery of assets and satisfaction of the plaintiff's debt, which was a judgment obtained in France, was brought. The defendant set up the English statute of limitations in bar of the claim, which was allowed by the Lord Keeper, and this decree was confirmed on a rehearing. The question was made at law, and LORD ELLENBOROUGH said: “It is said that parties who have contracted abroad return to this country with the same rights which they had in the country where they so contracted; and, generally speaking, that is so, — that is, if the rights of the contracting parties be extinguished

by the foreign law, by the happening of certain events. But here there is only an extinction of the remedy in the foreign court, according to the law stated to be received there, but no extinction of the right; and there is no law or authority that where there is an extinction of the remedy only in the foreign court, that shall operate, by comity, as an extinction of the remedy here also. If it goes to the extinction of the right itself, the case may be different.” Campbell v. Stein, 8 Dowl's Par. 116. The uniform administration of the law has been that the *lex loci contractus* expounds the obligations of contracts, and a statute of limitations prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertains *ad tempus et modum actionis institudendæ*, and not *ad valorem contractus*. Townsend v. Jameson, 9 How. (U. S.) 407; United States v. Donnelly, 8 Pet. (U. S.) 361. In Dash v. Tup

rule that, as the statute operates merely upon the remedy, the law of the *forum*, and not the law of the *situs* of the contract, controls.¹ But,

per, 1 Cai. (N. Y.) 402, in an action upon a note, the statute of limitations of New York was pleaded, and the plaintiff replied that the note was made in Connecticut, where the statute was seventeen years, whereas in New York it was only six years. The court held this replication bad on demurrer. In Scotland it has been held that, as to process brought there to recover an English debt, the statute of prescription in England cannot be pleaded, but that it may be pleaded to infer a presumption of payment; and the plaintiff will be permitted by positive evidence to overcome this presumption by contrary presumptions, or to show from the circumstances of the case that payment cannot be presumed. Kame's Principles of Equity, c. 8, p. 369. But this doctrine does not prevail in this country. WAYNE, J., in *Townsend v. Jameson*, 9 How. (U. S.) 407, in a very able and exhaustive opinion, says: "Most of the civilians, however, did not lose sight of the difference between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them as to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitations in suits upon contracts only relate to the remedy. But that was not done; and from some expressions of POTHIER and LORD KAMES, it was said, 'If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive to every other place as in the place of the contract.' . . . But neither POTHIER nor LORD KAMES meant to be understood that the theory of statutes of limitations purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made," but only that the presumption is in favor of the party pleading the statute. Bigelow

v. Ames, 18 Minn. 537. In *Miller v. Brenhaur*, 7 Hun (N. Y.), 330, in an action upon a foreign judgment, it was held that the statute of the State in which the judgment was rendered could not be set up to defeat the action in New York, as the statute is local. *Hubbell v. Cowdrey*, 5 Johns. (N. Y.) 132; *Bissell v. Hall*, 11 id. 168; *Ruggles v. Keeler*, 3 id. 264; *Carpenter v. Wells*, 21 Barb. (N. Y.) 593; *Power v. Hathaway*, 43 id. 214; *Toulandau v. Lachmeyer*, 7 How. Pr. (N. Y.) 145. In *Loveland v. Davidson*, 3 Penn. L. J. 377, an action was brought in Pennsylvania upon a judgment obtained before a justice of the peace in New York, which was barred by the statute of limitations of that State. Held, that it was not a bar to an action thereon in Pennsylvania. *Murray v. Fisher*, 5 Lans. (N. Y.) 98.

¹ *McCluny v. Silliman*, 3 Pet. (U. S.) 270; *Townsend v. Jennison*, 9 How. (U. S.) 407; *Thibodeau v. Levasser*, 36 Me. 362; *Le Roy v. Crowningshield*, 2 Mas. (U. S.) 151; *Jones v. Hays*, 4 McLean (U. S.), 521; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Nicolls v. Rodgers*, 2 Paine (U. S.), 437; *Egberts v. Dibble*, 3 McLean (U. S.), 86; *Miller v. Brenham*, 68 N. Y. 83; *Mayer v. Freedman*, 7 Hun (N. Y.), 218. In *Loveland v. Davidson*, 3 Penn. L. J. Rep. 377, in an action on a judgment obtained before a justice in New York, the defendant set up the New York statute of limitations in defence. The court held that the plea was bad, and that the *lex fori*, and not the *lex contractus*, governed. And even in those States where by statute the statute of another State may be set up to bar the action, the right to rely on the defence must be affirmatively shown by the answer. *Gillett v. Hall*, 32 Iowa, 226. This question was raised in *Miller v. Brenham*, 7 Hun (N. Y.), 330. In this case an action was brought against the defendant upon a judgment obtained against him in California. It was contended that the action was too late, because by the statute of California an action upon any judgment of the courts of the United States, or of any State and Territory, was required to be commenced within five years from its rendition, where-

if the statute extinguishes the right itself, it may be set up as a bar to an action thereon wherever brought.¹ This rule is forcibly illustrated in another way, and that is, that where by the laws of the *forum* a shorter period for the limitation of a claim is fixed than by the law of the *situs* of the contract, the statute of the *forum* will bar the claim if the party setting it up brings himself within it, although the statute of the place of contract has not run. Thus, in Massachusetts, a witnessed note is not barred until the lapse of twenty years; but in New York no distinction is made between a witnessed note and any other; and in an action in the latter State upon a witnessed note made in Massachusetts and payable there, it was held that the statute of New York run upon it in six years.²

There is a distinction as suggested by STORY, J., in his Conflict of Laws, and as suggested in reference to the preceding rule, in cases where the right as well as the remedy of the claimant is barred by the law existing at the place of contract.³ This, however, is not perhaps a fre-

as nearly eight years had elapsed since the judgment in action was obtained. Under this statute, if the action was not brought within five years, the judgment was neither discharged nor extinguished, but the party was simply deprived of his remedy. The court, in denying this defence, said: "The statute did not affect the remedy in any other respect, and consequently it cannot be allowed to control the proceedings in this State, brought for the collection of the judgment. The effect of statutes relating alone to the remedy is necessarily local, and this is a provision of that description. In this State an action upon the judgment could only be barred by showing that the defendant had resided here for the length of time required for that purpose by the terms of our statute." *Hendricks v. Comstock*, 12 Ind. 238; *Watson v. Brewster*, 1 Penn. St. 381; *Paine v. Drew*, 44 N. H. 306; *Hubbell v. Cowdrey*, 5 Johns. (N. Y.) 132; *Bissell v. Hall*, 11 id. 168; *Ruggles v. Keeler*, 3 id. 264; *Carpenter v. Wells*, 21 Barb. (N. Y.) 293; *Power v. Hathaway*, 43 id. 214; *Toulandau v. Lachmeyer*, 37 How. Pr. (N. Y.) 145. In *Putnam v. Dike*, 13 Gray (Mass.), 535, the court held that, although the debt arose forty years before action was brought thereon, it was not barred without proof that the defendant has ever been in the State; and in *Lawrence v. Bassett*, 5 Allen (Mass.), 140, it was held that a note is not barred by the statute although overdue for more

than six years, although the maker was once a resident of the State, but has lived out of it ever since the action accrued. *Walworth v. Routh*, 14 La. An. 205; *Garraway v. Hopkins*, 1 Head (Tenn.), 583; *Putnam v. Dike*, 13 Gray (Mass.), 535; *Bulger v. Roche*, 11 Pick. (Mass.) 36; *Flowers v. Foreman*, 23 How. (U. S.) 132; *Carson v. Hunter*, 46 Mo. 467; *Stage Wagon Co. v. Mathieson*, 3 Dak. 233.

¹ *Gans v. Frank*, 36 Barb. (N. Y.) 320; *Perkins v. Guy*, 55 Miss. 153. The rule may be said to lead to these results: the statute of the country in which suit is brought may be pleaded to bar a recovery on a contract made out of its jurisdiction, but the statute of the State where the contract was made cannot be pleaded. But when the statute of the place where the contract was made operates to extinguish the contract or debt itself, and the contract is sued upon in another State, the statute of the *lex loci contractus*, and not of the *lex fori*, controls. *McMerty v. Morrison*, 62 Mo. 140; *McArthur v. Goddin*, 12 Bush (Ky.), 274; *Jones v. Jones*, 18 Ala. 248; *Cobb v. Thompson*, 1 A. K. Mar. (Ky.) 507; *Harper v. Hampton*, 1 H. & J. (Md.) 622; *Fletcher v. Spaulding*, 9 Minn. 64.

² *Nicolls v. Rodgers*, 2 Paine (U. S.), 437.

³ *Carpenter v. Minturn*, 6 Lans. (N. Y.) 56; *Gans v. Frank*, 36 Barb. (N. Y.) 320; *Perkins v. Guy*, 55 Miss. 155. In *McMerty v. Morrison*, 62 Mo. 140, the court

quent case in regard to personal actions. In all cases touching realty the *lex rei sitæ* prevails.¹

STORY, J., in a case previously cited,² stated the inclination of his mind to be, that, where the statute of the *loci contractus* barred all remedy upon the claim, "there is a virtual extinction of the right in that place, which ought to be recognized in every other tribunal as of equal validity;" although the decision in the case was adverse to this view. At a later period he wrote his work on *The Conflict of Laws*, and from what he there says, it is evident that he changed his views in this respect. He says: "It may be stated that, as the law of prescription of a particular country, even in case of a contract made in such country, forms no part of the contract itself, but merely acts upon it *ex post facto*, in case of a suit, it cannot properly be deemed a right stipulated for or included in the contract."³ SHAW, C. J., in a Massachusetts case,⁴ treated the rule as well settled as stated in the text, but intimated that, if it was an open question, it might be attended with some difficulty. In a later case, it was held that an action for breach of promise of marriage brought by a foreigner within six years after coming to this country was not barred, although the promise was made more than twenty years previously in her native country.⁵ In some of the States provision is made by statute that, in certain cases, and subject to certain conditions, the statute of another State, where the defendant has resided for the requisite period to bar the claim, may be interposed as a bar in the State where action is brought. This is the case in Massachusetts, Nebraska, Nevada, Kansas, Oregon, Iowa, Texas, Florida, and Ohio.⁶ And in Wisconsin it is held that when both parties reside

say: "The statute of limitations of the country in which suit is brought may be pleaded to bar a recovery on a contract made out of its political jurisdiction, but the statute of the place where the contract was made cannot be pleaded. But when the statute of limitations where the contract was made operates to destroy or extinguish the right or debt itself, and the contract is sued in another State, the *lex loci contractus*, and not the *lex fori*, governs. *Fears v. Sykes*, 35 Miss. 633. When a right of action has expired by limitation of the statute of another State by which alone the right is created, no action can be maintained thereon in another State. *Halsey v. McLean*, 12 Allen (Mass.), 439.

¹ *Pitt v. Lord Dacre*, L. R. 3 Ch. D. 295; *Story on Conflict of Laws*, 581.

² *Le Roy v. Crowningshield*, 2 Mas. (U. S. C. C.) 151.

³ *Story on Conflict of Laws*, 583.

⁴ *Bulger v. Roche*, 11 Mass. 36.

⁵ *Goetz v. Voelinger*, 99 Mass. 504. But now the rule is otherwise by statute of 1880, c. 98, and Stat. 1882, p. 1115. In *Atwater v. Townsend*, 4 Conn. 47, it was held that neither the statute of limitations nor a discharge under the insolvent laws of the *lex loci contractus* can be set up to bar a remedy. See *Smith v. Spinola*, 2 Johns. (N. Y.) 196; *Sicard v. Whale*, 11 id. 194; *Whitmore v. Adams*, 2 Cow. (N. Y.) 626; *Shervell v. Hopkins*, 1 id. 108; *Beckwith v. Angell*, 6 Conn. 322; *Woodbridge v. Wright*, 8 id. 523; *Smith v. Healy*, 4 id. 49. The last two cases relate to a discharge under insolvent laws.

⁶ Nebraska Gen. Stat. c. 55, tit. 11; Nevada Comp. Laws, c. 50, § 33; Indiana Rev. Stat. 1872; Kansas Gen. Laws, c. 26, tit. 2, § 28; Oregon Gen. Laws, c. 1, tit. 11, § 26; Iowa Code, tit. 19, c. 99, § 1665; Massachusetts Stat. 1882, p. 1115;

therein until a debt is barred or a title made, the right is extinguished so that it would be a defence in another State.¹ Under these saving statutes, where a right is completely barred under the statutes of another State or country, it forms a valid defence in the State in the statute of which such saving clause exists.² But, in order to avail himself of that defence, it must be affirmatively stated in the plea or answer, and must be fully established by the defendant by proof, showing that the statute of the State relied on has fully run upon the claim, and that the conditions required to make such statute a bar existed. Independent of any such statutory provision, the rule is well settled, that when the citizen of one State seeks a remedy upon a contract or claim in the forum of another State, he thereby impliedly submits to all the laws of such State relating to the remedy, and has no cause of complaint if those laws deprive him of advantages that he might have had under the laws of his own State.³ It is a rule of law,

Texas, Harr. Dig., Laws of Texas, 2389; Florida, Thomp. Dig. c. 2; Ohio, Statute of Ohio, 1841, § 4. See Appendix.

¹ *Brown v. Parker*, 28 Wis. 21; *Knox v. Cleveland*, 13 id. 245.

² *State v. Ladd*, 1 Biss. (U. S. C. C.) 69; *Harris v. Harris*, 38 Ind. 402; *Van Dorn v. Bodley*, id. 402; *Hoggett v. Emerson*, 8 Kan. 262. In Nebraska, when a cause of action is fully barred by the law of another State where the defendant had previously resided, it also is a bar there. In Nevada, where a cause of action arose in another State or country, and by the law thereof an action cannot be maintained upon it there, no action can be maintained thereon in Nevada. A similar provision exists in the statute of Kansas. In Ohio and Oregon, when the cause of action arose out of the State, and between non-residents, and by the laws of the State or country where the cause of action arose an action cannot be maintained thereon, no action can be maintained thereon in those States. In Iowa, when a claim is barred by the laws of any State or country where the defendant has previously resided, it is also barred there. In Texas, the provision is similar to that in Oregon. In Florida, an inhabitant or resident of that State may set up the statute of the State where the contract was made, in bar.

³ *Blackburn v. Merton*, 18 Ark. 384. The statute of a State acting upon the title to personal property may be set up in a foreign jurisdiction, as it relates to the

right rather than to the remedy. *Fears v. Sykes*, 35 Miss. 633; but except where the statute extinguishes the right of action, in the absence of any such statutory provision in the State where action is brought, only the statute of such State can bar the remedy. *Urton v. Hunter*, 2 W. Va. 83; *Decouch v. Lavetier*, 3 Johns. Ch. (N. Y.) 190; *Gassaway v. Hopkins*, 1 Head (Tenn.), 383; *Crawford v. Childress*, 1 Ala. 482; *King v. Lane*, 7 Mo. 241; *Egberts v. Dibble*, 3 McLean (U. S.), 86; *Cartier v. Paige*, 8 Vt. 150; *Jones v. Hayes*, 4 McLean (U. S.), 521; *Estes v. Kyle*, Meigs (Tenn.), 34; *State v. Swope*, 7 Ind. 91; *Pegram v. Williams*, 4 Rich. (S. C.) 219; *Thibodeau v. Levasseur*, 36 Me. 362; *Bissell v. Hall*, 11 Johns. (N. Y.) 168; *Woodbridge v. Austin*, 2 Tyler (Vt.), 364; *Wilkinson v. Holloway*, 7 Leigh (Va.), 277; *Thompson v. Tioga, &c. R. R. Co.*, 36 Barb. (N. Y.) 79; *Paine v. Drew*, 44 N. H. 306; *Crocker v. Avery*, 3 R. I. 178; *Cobb v. Thompson*, 1 A. K. Mar. (Ky.) 507; *Flower v. Foreman*, 23 How. (U. S.) 132; *Harper v. Hammond*, 1 H. & J. (Md.) 622; *Richards v. Bickley*, 13 S. & R. (Penn.) 395; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263; *Bruce v. Luck*, 4 Greene (Iowa), 143; *Hawkins v. Barney*, 5 Pet. (U. S.) 457; *Jones v. Hook*, 2 Rand. (Va.) 403; *Pearshall v. Dwight*, 2 Mass. 84; *Ward v. Hallam*, 1 Yeates (Penn.), 329; *Toulandau v. Lachmeyer*, 37 How. Pr. (N. Y.) 145; *Levy v. Boas*, 2 Bailey (S. C.), 217; *Hinton v. Townes*, 1 Hill (S. C.), 439;

too universally conceded to need supporting authorities, that contracts are to be construed according to the *lex loci contractus*, but that they are to be enforced according to the *lex fori*. This distinction is by no means peculiar to the common law, but is found in other municipal codes which adopt the civil law as their basis.¹ “*Præscriptia et executio*,” says HUBERUS, “non pertinent ad valorem contractus sed ad tempus et modum actionis instituendæ, ad eo que recepta est optima ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato spectetur.”² We have already seen that so much of the law of a foreign country as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of that country where the action is brought. The time of limitation of actions therefore is governed by the law of the country where the action is brought, and not by the *lex loci contractus*. But where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim or title, or cause of action itself, *ipso facto*, and declares it a nullity after the lapse of the prescribed period, such law of prescription or limitation may be set up in any other country to which the parties may remove as an absolute bar by way of extinguishment, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy. By the French law, all rights of action relative to letters of exchange and bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, expire in five years, reckoning from the day of protest or from the last suing out of any judicial process, if there has been no judgment, or if the debt has not been acknowledged by any separate act. But the alleged debtors are held, if required, to affirm on oath that they are no longer indebted, and their widows, heirs, &c., that they *bona fide* believe there is no longer anything due. The French law of limitation, therefore, does not extinguish or annul the contract, but operates upon the remedy only. If, therefore, a party

Graves v. Graves, 2 Bibb (Ky.), 207. In Louisiana, the statute of another State may be set up to defeat an action upon two conditions: 1st, when the debt accrued between parties, both of whom resided out of the State, and where the debt was to be paid out of the State; and, 2d, where the defendant removes to the State after the statute bar has become complete. Walworth v. Routh, 14 La. An. 205. Sustaining the doctrine of the text, see Jones v. Jones, 18 Ala. 248; Medbury v. Hopkins, 8 Conn. 472; Hendricks v. Comstock, 12 Ind. 238; Fletcher v. Spaulding,

9 Minn. 64. And in those States where the statute lets in the statute of another State to bar the remedy, it is necessary that the statute bar of such State should be complete. Hays v. Cage, 2 Tex. 505; Smith v. Crosby, id. 414. And time that has partly run in one State cannot be tacked to the time that has run in the State where the action is brought to complete the bar. Perry v. Lewis, 6 Fla. 555.

¹ Traite de Assurance, c. 4.

² Prælec. de Conflicti Legum, vol. ii. Lib. 1.

who has contracted in France removes to this country, and is sued here upon the contract, the action will be governed by the law of the State in which the action is brought, and not by the French law of limitation of actions.¹

SEC. 9. Distinction where a Statute gives and limits the Remedy.—There is an important distinction to be observed in the application of this rule. When the statute of a particular State or country gives a remedy which did not exist at common law, and at the same time limits the period within which action therefor shall be brought, the period of limitation thus named controls in whatever jurisdiction action may be brought.² A contrary rule would result in upholding a right of action where none existed by virtue of the common law, simply because the statutes of a foreign jurisdiction gave a remedy, although in fact, under such statute, the remedy was lost. Thus, in the case first cited in the preceding note, an action was brought in the United States Court for the Eastern District of Michigan by an administrator for the death of his testator by the explosion of a steamboat boiler. The explosion took place in the Province of Ontario; and, under a statute existing there, a remedy was given to an administrator or executor of a person whose death was caused by the negligence of another, if there would have been a liability therefor at the common law if death had not ensued. But this right of action existed only subject to the provision that “every such action shall be commenced within twelve months after the death of such deceased person.” The action was not brought within twelve months after the testator’s decease; and the court held that while an action under such a statute could be maintained in another State or country,³ yet it could only be maintained subject to all the limitations and conditions imposed by the statute, and that the plaintiff must show that he has complied with all such conditions and limitations in every particular, or his action will fail. In creating the right, the legislature has the power to impose upon it any restrictions it sees fit, and the conditions so imposed qualify the right, and are an integral part thereof; they are conditions precedent, so to speak, that must be fully complied with, or the right does not exist. Such rights being in derogation of the common law, all restrictive language is construed against it.⁴ It seems, also, that where such a right is given by statute, and a limitation is therein imposed as to the time within which the action shall be brought, and subsequent to the time

¹ *Huber v. Steiner*, 2 Sc. 326; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Le Roux v. Brown*, 12 C. B. 801; *Ruckmaboye v. Mottichund*, 8 Moo. P. C. 4.

² *Boyd v. Clark*, U. S. C. C. (Mich.) October Term, 1881, reported 24 Alb. L. J. 508; *Eastwood v. Kennedy*, 44 Md. 563; *Baker v. Stonebroker*, 36 Mo. 349; *Huber v. Steiner*, 2 Bing. N. C. 202; *Halsey v. McLean*, 12 Allen (Mass.), 439.

³ See to that effect *Eastwood v. Kennedy*, 44 Md. 563; *Huber v. Steiner*, 2 Bing. N. C. 202; *Baker v. Stonebroker*, 36 Mo. 349; *Dennick v. Railroad Co.*, 103 U. S. 11.

⁴ *Pittsburgh, C., & St. Louis R. R. Co. v. Hine*, 25 Ohio St. 629.

when a right accrued thereunder the right is enlarged or restricted, and the limitation clause is repealed, that the right can only be enforced under the statute as it stood when it accrued, and subject to all its conditions and limitations.¹

SEC. 10. Rule when Title to Personal Property is acquired by Possession under the Statute of a State.—When personal property is held adversely in one State for a sufficient length of time to acquire a title thereto, under a statute existing relative thereto, there can be no reason why the title so acquired should not be recognized in every State, although the statute of such other State requires a longer possession, or, in fact, although no title by possession can ever be acquired to personal property in such other State; and such seems to be the rule.² In such a case, lapse of time not only bars the remedy, but also extinguishes the right to the property in question; and in such cases, as we have already seen, the courts recognize the statute of the foreign jurisdiction as controlling the rights of the parties.³ In a case in the United States court⁴ this question was ably considered, and the doctrine stated in the text is vindicated upon the ground that there is an essential distinction between a statute giving title by possession and one simply limiting the remedy. In the one case the right is extinguished, while in the other the right still exists, but the remedy therefor is taken away. In a case previously cited⁵ in the same court this question was directly raised in a case where the possession of a slave was sought to be obtained in an action of detinue, and it was held that, as the laws of Virginia provided that five years' *bona fide* possession of a slave shall constitute a good title thereto, and as the vendee's vendor had acquired such title under that statute, he might set up such title in the courts of Tennessee as a defence to an action there brought to recover such slave.⁶

SEC. 11. Constitutionality of Limitation Acts.—Before proceeding to discuss the numerous questions arising under these statutes, it is advisable to ascertain how far, under the clause of the Constitution providing that no State shall pass any law impairing the obligation of contracts, the legislature of the several States may go in imposing or varying limitations affecting contracts then existing.

¹ Pittsburgh, C., & St. Louis R. R. Co. v. Hine, 25 Ohio St. 629.

² Shelby v. Guy, 11 Wheat. (U. S.) 361; Bracon v. Bracon, 5 Ala. 508; Goodman v. Monks, 8 Port. (Ala.) 84, 130; Fears v. Sykes, 35 Miss. 633; Blackburn v. Morton, 18 Ark. 384; Cargill v. Harrison, 9 B. Mon. (Ky.) 518. But see Jones v. Jones, 18 Ala. 248; Newby v. Blackley, 3 H. & M. (Va.) 57; Townsend v. Jameson, 9 How. (U. S.) 407. See also Story on Conflict of Laws, § 582, where that eminent author suggests this exception.

³ Perkins v. Guy, *ante*; Gans v. Frank, *ante*; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Beckford v. Wade, 17 Ves. 87; De La Vega v. Vianna, 1 B. & Ad. 284; Don v. Lipmann, 1 Cl. & F. 1; British, &c. Co. v. Drummond, 10 B. & C. 903.

⁴ Townsend v. Jameson, 9 How. U. S. 407; Brent v. Chapman, 5 Cranch (U. S.), 358.

⁵ Shelby v. Guy, *ante*.

⁶ See also to the same effect Brent v. Chapman, *ante*; Brown v. Brown, *ante*; Newby v. Blackley, *ante*.

It may be said that the obligation of a contract is the law that binds the party to perform his undertaking, and consists in the power and efficacy of the law which applies to and enforces performance, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself *proprio vigore*, but in the law applicable to the contract;¹ therefore, where rights are acquired, and have vested under a statute, they cannot be divested by a repeal or modification thereof.² But statutes relating merely to the remedy upon

¹ *Ogden v. Saunders*, 12 Wheat. (U. S.) 318; *Lapsley v. Brashear*, 4 Litt. (Ky.) 47; *Blair v. Williams*, id. 34; *Sohn v. Watterson*, 17 Wall. (U. S.) 596. In *Harris v. Grey*, 49 Ga. 585; *Davidson v. Lawrence*, id. 335; *Kimbrow v. Bank of Fulton*, id. 419; *George v. Gardner*, id. 441, it was held that a limitation act passed March 16, 1869, barring after Jan. 1, 1870, actions the right whereof accrued prior to June 1, 1869, is not unconstitutional. *Bentwick v. Franklin*, 38 Tex. 358. In *De Moss v. Newton*, 31 Ind. 219, the court say: "Where a right springs, not from a contract, but from legislative enactment, the action to enforce a claim under such enactment may be limited by law; and the legislature is the exclusive judge of the reasonableness of the time allowed within which the action may be brought, and neither the fact that the period is short or long is one which will enable the court to declare the act void for unreasonableness. *Adamson v. Davis*, 47 Mo. 268. In *Korn v. Brown*, 64 Penn. St. 55, the section of the Pennsylvania statute barring a recovery on ground-rents, unless brought within twenty-one years, was held constitutional although retrospective. A statute that provides that the statute shall not run against the plaintiff if he resides in the State, but shall if he resides out of it, is held not to violate the provisions of the Federal Constitution, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Chemung County Bank v. Lowery*, 93 U. S. 72. And the same has been held as to statutes barring judgments obtained in other States. *Meek v. Meek*, 45 Iowa, 294. That the statute may provide different periods of limitations as to non-residents, see *Hawse v. Burgmire*, 4 Col. 313. In Georgia, the question as to whether a

statute of limitations applying to debts existing at the time of its passage violated the provisions of the constitution of that State inhibiting laws impairing the obligations of a contract was raised in several cases, and the court held that it did not. That these statutes simply relate to the remedy, and do not affect the obligations of the contract, see *Davidson v. Lawrence*, 49 Ga. 335; *Harris v. Grey*, id. 585; *Kimbrow v. Fulton Bank*, id. 419; *George v. Gardner*, id. 441. This question was also raised in the United States Supreme Court, and was similarly decided, *Sohn v. Watterson*, 17 Wall. (U. S.) 596, the court observing that ordinarily the true rule for applying these statutes to rights of action already accrued is to allow the party the statutory time for suing, computing it from the passage of the act, and to consider the limitation as commencing at the time when the cause of action is first subjected to the operation of the statute.

² *Southard v. Central R. R. Co.*, 26 N. J. L. 13; *Benson v. The Mayor*, 10 Barb. (N. Y.) 223; *Houston v. Boyle*, 10 Ired. (N. C.) 496; *Oriental Bank v. Freize*, 18 Me. 109; *Coffin v. Rich*, 45 id. 507; *Davis v. O'Ferrall*, 4 Greene (Iowa), 168. In *Girdner v. Stephens*, 1 Heisk. (Tenn.) 280, sec. 4 of the schedule of the amended constitution of 1865, and sec. 4 of the schedule of the new constitution of 1870, and the act of May 30, 1865, c. 10, § 1, so far as their terms and effect authorized the bringing of an action to recover on claims of any kind which by existing laws were already barred, was held unconstitutional, because interfering with vested rights. See *Adamson v. Davis*, 47 Mo. 268, also 272 and 273. To the same effect, *Thompson v. Read*, 41 Iowa, 48; *Pitman v. Bump*, 5 Oregon, 17.

a contract are not vested rights, and consequently do not impair the obligation of contracts,¹ consequently the remedy of a party upon an existing contract may be changed, although the law effecting the change affects actions then pending.² Statutes of limitation relate only to the remedy,³ and may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action;⁴ but it cannot limit existing

¹ *Oriental Bank v. Freize*, *ante*; *Read v. Frankfort Bank*, 23 Me. 318; *Evans v. Montgomery*, 4 W. & S. (Penn.) 218; *Hope v. Johnson*, 2 Yerg. (Tenn.) 125; *Curry v. Sanders*, 35 Ala. 280; *Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Cutts v. Hardee*, 38 Ga. 350; *Hope v. Johnson*, 2 Yerg. (Tenn.) 123; *Cook v. Grey*, 2 Houst. (Del.) 454; *Ralston v. Lothair*, 18 Ind. 303. "If," says the court in *Terry v. Anderson*, 95 U. S. 628, "the legislature may prescribe a limitation where none existed before, it may change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced." The legislature may bar actions upon judgments of other States. *Meek v. Meek*, 45 Iowa, 294.

Upon the general proposition and holding that the legislature has power to change the period of limitations as to all claims not already barred, allowing a reasonable time for bringing actions thereon, is valid, see *Hyman v. Bayne*, 88 Ill. 256; *Dyer v. Gill*, 32 Ark. 410; *Pearsall v. Kenan*, 79 N. C. 472; *People v. Wayne Co. Judge*, 37 Mich. 287; *Sampson v. Sampson*, 63 Me. 328; *Krone v. Krone*, 37 id. 308; *Johnson v. Railroad Co.*, 54 N. Y. 416. And even though no provision therefor is made in the new law, if it does not expressly take away such right, it will be construed as giving a reasonable time after its passage before existing claims are barred. *Dale v. Frisbie*, 59 Ind. 520; *Button v. Guy*, 12 S. C. 42. That legislature may give a statute a retroactive effect, see *Ludwig v. Stewart*, 32 Mich. 27; *Horbach v. Miller*, 4 Neb. 31. Whatever may be the rule as to contracts, the legis-

lature has unrestricted power to change the period of limitations as to actions *ex delicto*. *Guilotell v. Mayors*, 55 How. Pr. (N. Y.) 114. And the same is also true as to all rights created by statute. *De Moss v. Newton*, 31 Ind. 219.

² *Read v. Frankfort Bank*, *ante*; *Woods v. Buie*, 6 Miss. 285; *Evans v. Montgomery*, 4 W. & S. (Penn.) 218; *Ralston v. Lothair*, *ante*; *Tucker v. Harris*, 13 Ga. 1. But it cannot, after the rights of a party have been adjudicated, interfere with the process to enforce that right so as to materially lessen the efficiency of the right of the judgment creditor. *Oliver v. McClure*, 28 Ark. 555. The remedy provided for the enforcement of contracts may be changed at the will of the legislature, provided the obligation of the contract is not thereby weakened, lessened, or impaired, *Holland v. Dickerson*, 41 Iowa, 367; and this is so, even though the act is retrospective. *Lane v. Nelson*, 79 Penn. St. 407; *Baldwin v. Newark*, 38 N. J. L. 334; *Tilton v. Swift*, 40 Iowa, 78. Special statutes affecting or applying only to a single city or county, unless such legislation is expressly prohibited in the constitution, are valid. *Nash v. Fletcher*, 44 Miss. 609. The period of limitation may be shortened. *Guilotell v. Mayor of New York*, 55 How. Pr. (N. Y.) 114.

³ *Cox v. Berry*, 13 Ga. 306; *Edwards v. McCaddon*, 20 Iowa, 520; *Mechanics' & Co. Bank* (appeal from Probate), 31 Conn. 63; *Wintermire v. Westover*, 14 N. Y. 16; *Pearce v. Patton*, 7 B. Mon. (Ky.) 162.

⁴ *Ludwig v. Stewart*, 32 Mich. 27; *Thompson v. Read*, 41 Iowa, 48; *Pitman v. Bump*, 5 Oreg. 17; *Memphis v. United States*, 97 U. S. 293; *Pearsall v. Kenan*, 79 N. C. 472; *Dyer v. Gill*, 32 Ark. 410; *Terry v. Anderson*, 95 U. S. 628. Relating only to the remedy, the statute is not a part of the contract until the statutory bar has be-

claims without allowing a reasonable time after its passage for parties to bring an action.¹

come complete ; consequently, before that time the period of limitation may be extended or lessened by the legislature without becoming obnoxious to any constitutional objection. *Edwards v. McCaddon*, 20 Iowa, 420 ; *Beal v. Nason*, 14 Me. 344 ; *Newkirk v. Chapron*, 17 Ill. 344 ; *Wright v. Oakley*, 5 Met. (Mass.) 400 ; *Battles v. Fobes*, 18 Pick. (Mass.) 532. The repeal or amendment of a statute of limitations does not apply to a claim already barred by the statute, because by the lapse of the statutory period the rights of the parties have become vested, and the legislature cannot detract from or enlarge them. *Battles v. Fobes*, 18 Pick. (Mass.) 532 ; *Seymour v. Deming*, 9 Cush. (Mass.) 529 ; *Willard v. Clarke*, 7 Met. (Mass.) 435 ; *Darling v. Wells*, 1 Cush. (Mass.) 508 ; *Brigham v. Bigelow*, 12 Met. (Mass.) 268 ; *Garfield v. Bemis*, 2 Allen (Mass.), 445. Thus, the legislature cannot give a remedy on a claim already barred by the statute, *Loring v. Boston*, 12 Gray (Mass.), 409 ; *Kinsman v. Cambridge*, 121 Mass. 558 ; nor deprive a party of the benefits of such bar, *Wright v. Oakley*, *ante* ; *Battles v. Fobes*, *ante*.

¹ *Horbach v. Miller*, 4 Neb. 31 ; *Holcombe v. Tracy*, 2 Minn. 241 ; *Lockhart v. Yeiser*, 2 Bush (Ky.), 231 ; *W. S. R. R. Co. v. Stockett*, 21 Miss. 395 ; *Beal v. Nason*, 14 Me. 344 ; *Call v. Hagger*, 8 Mass. 430. It was held at an early day in the history of our statutes that they do not come under the bar of the Constitution of the United States or of the State constitutions, except where they are retrospective, in the legal sense of the term ; that is, unless they impaired vested rights. *Gospel Society v. Wheeler*, 2 Gall. (U. S. C. C.) 105 ; *Ogden v. Saunders*, 12 Wheat. (U. S.) 349 ; *Wintermire v. Westover*, 14 N. Y. 16 ; *Bush v. Van Kleck*, 7 Johns. (N. Y.) 447 ; *Calder v. Bull*, 3 Dall. (Penn.) 386 ; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122. A statute that barred a past right of action, without any provision for a period within which an action might be brought, would not only be unreasonable and obnoxious to the objection that it impaired the rights of private property, but

subject to this exception such laws have been held valid, and applying to the remedy merely their retrospective operation is no objection to them, *Hope v. Johnson*, 2 Yerg. (Tenn.) 123 ; *United States v. Samperyac*, 1 Hempst. (U. S. C. C.) 118 ; *Cutts v. Harder*, 38 Ga. 350 ; *Rathbone v. Bradford*, 1 Ala. 312 ; *Steamboat Co. v. Barclay*, 30 id. 120 ; *Holcombe v. Tracy*, 2 Minn. 241 ; *Lockhart v. Yeiser*, 2 Bush (Ky.), 231 ; *Cook v. Wood*, 1 McCord (S. C.), 139 ; *Beltzhoover v. Yewell*, 1 G. & J. (Md.) 212 ; *Cox v. Berry*, 13 Ga. 306 ; *Billings v. Hull*, 7 Cal. 1 ; *Blackford v. Peltier*, 1 Blackf. (Ind.) 36 ; *Griffin v. McKenzie*, 7 Ga. 163 ; *Ward v. Kilts*, 12 Wend. (N. Y.) 137 ; *Eckstein v. Shoemaker*, 3 Whart. (Penn.) 15 ; *Frey v. Kirk*, 4 G. & J. (Md.) 509 ; *Hawkins v. Barney*, 5 Pet. (U. S.) 485 ; *Charlestown Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

The rules fairly deducible from the reported cases are, that it is competent for the legislature to make a statute retrospective where it does not impair the obligation of a contract or a vested right. *Satterlee v. Matthewson*, 16 S. & R. (Penn.) 169 ; *Weiser v. Hade*, 52 Penn. St. 472. Statutes relating merely to the remedy are not a part of contracts made while it is in force ; therefore the legislature may alter, modify, or repeal the same at any time before rights have become complete under them, and as statutes of limitation merely relate to the remedy, it follows that the legislature may alter the same at any time before a claim has become barred under them. *Miller v. Com.*, 5 W. & S. (Penn.) 488. In *Bigelow v. Bemis*, 2 Allen Mass., 496, BIGELOW, J., says : " It is well settled that it is competent for the legislature to change statutes prescribing a limitation to actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction on the exercise of this power is that the legislature cannot remove a bar or limitation which has already become complete, and that no new limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring actions before their claims

It has been held in a case decided by a majority of the Supreme

are absolutely barred by a new enactment. See also to same effect *Dillon v. Dougherty*, 2 Grant's Cas. (Penn.) 99; *Morford v. Cook*, 24 Penn. St. 92; *Call v. Hagger*, 8 Mass. 423; *Smith v. Morrison*, 22 Pick. (Mass.) 430; and the cases cited *ante*, as well as those hereafter cited in this note. In *Prentice v. Dehon*, 10 Allen (Mass.), 353, and *Ball v. Wyeth*, 99 Mass. 338, it was a query with the court whether the legislature possessed the power to give a remedy upon a claim already barred; but as this question has invariably been decided in the negative, it can hardly be regarded as an open one, although we confess that, upon the theory adopted by the courts, we see no reason why the legislature might not exercise this power. Under these statutes generally the right is not extinguished, but only the right of action thereon is taken away. The claim may be sued in another State and a judgment obtained, and an action upon that judgment may be maintained in the courts of the State by the statute of which the claim on which the judgment was obtained was barred. Now, if the person against whom the claim exists acquires such a vested right under the statute, that after the statute has run upon the claim the legislature cannot give a remedy thereon, it must be upon the ground that the claim has been extinguished by the statute, in which event it ceases to be an enforceable obligation anywhere, whereas the courts hold, as we have seen, that the right is not extinguished, but only the remedy thereon taken away. In *Campbell v. Holt*, 115 U. S. 620, this doctrine has been held, and a strong intimation that such doctrine would be held in New York, should the question ever be raised there, has been given in a recent case. In New Hampshire, in *Woart v. Winnick*, 3 N. H. 473, it was held that an act repealing an act of limitation was, as to all actions pending at the time of the repeal, retrospective and contrary to the State constitution; and this, of course, would be the rule where the constitution prohibits retrospective laws. The law seems to be well settled that the legislature may change the statute even as to existing claims, if a

reasonable time is allowed for the bringing of actions thereon. *Nash v. Fletcher*, 44 Miss. 609; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Elliott v. Lochrane*, 1 Kan. 126; *Pierce v. Tobey*, 5 Met. (Mass.) 158; *State v. Clark*, 7 Ind. 468; *Beesley v. Spencer*, 25 Ill. 216; *Root v. Bradley*, 1 Kan. 437; *Wright v. Keithler*, 7 Iowa, 92; *Cox v. Brown*, 6 Jones (N. C.) L. 100; *Pierce v. Patton*, 7 B. Mon. (Ky.) 172; *Callaway v. Molley*, 31 Mo. 393; *Sleeth v. Murphy*, 1 Morris (Iowa), 321; *Howell v. Howell*, 15 Wis. 55; *Gilman v. Cutts*, 23 N. H. 376; *Beal v. Nason*, 14 Me. 344; *Martin v. Martin*, 3 Ala. 560; *Willard v. Harvey*, 24 N. H. 344; *Webster v. Cooper*, 14 How. (U. S.) 488; *Railroad Co. v. Stockett*, 13 S. & M. (Miss.) 375; *Fiske v. Briggs*, 6 R. I. 557; *Bank v. Dutton*, 9 How. (U. S.) 522; *Kilburn v. Lackman*, 8 Iowa, 380; *Winston v. McCormick*, 1 Ind. 56; *Pritchard v. Spencer*, 2 Ind. 486; *Briscoe v. Ankelette*, 28 Miss. 361; *Slater v. Com.*, 3 Ohio St. 80; *Holcombe v. Tracy*, 2 Minn. 241; *De Cordova v. Galveston*, 4 Tex. 470. Unless the statute expressly so provides, a change in the law does not operate upon claims then existing, but only upon those subsequently arising. *Gibbons v. Goodrich*, 3 Ill. App. 590; *Van Hook v. Whitlock*, 3 Paige Ch. (N. Y.) 805; *Deal v. Patterson*, 14 La. An. 728; *Culvert v. Lanner*, 10 Ark. 147; *Didier v. Davidson*, 2 Barb. Ch. (N. Y.) 477; *Ashbrooke v. Quarle's Heirs*, 15 B. Mon. (Ky.) 20; *Calkins v. Calkins*, 3 Barb. (N. Y.) 305; *Lucas v. Tunstall*, 5 Ark. 448; *Ridgeley v. Steamboat Reindeer*, 27 Mo. 442; *People v. Supervisors*, 10 Wend. (N. Y.) 306; *Clemens v. Wilkinson*, 10 Miss. 97; *Gordon v. Mounts*, 2 Greene (Iowa), 343; *McKenney v. McKenney*, 8 Ohio St. 423; *Williamson v. Field*, 2 Sandf. (N. Y.) Ch. 533; *Thompson v. Alexander*, 11 Ill. 54; *Dickerson v. Morrison*, 5 Ark. 264; *Scarborough v. Dugan*, 10 Cal. 305; *Brown v. Wilcox*, 10 Miss. 97; *Paddleford v. Dunn*, 14 Mo. 517; *Hinch v. Weatherford*, 2 Greene (Iowa), 244; *Boyd v. Barringer*, 23 Miss. 269. That a statute may extend the time of limitation upon existing claims has been frequently held, but it cannot, and does

Court of the United States¹ that in actions upon debt, contract, or any class of actions in which a party does not become invested with the title to property by the statute of limitations, that the legislature may by a repeal of the statute of limitations, even after the right of action thereon is barred, restore to the plaintiff his remedy thereon, and divest the other party of the statutory bar. The doctrine of this case is undoubtedly technically correct, and was suggested in the first edition of this work, in Note 1, page 28. It is, however, opposed to the great weight of authority in this country, and is opposed to the policy of these statutes. There can be no question that the legislatures of the several States by the passage of the statute of limitations intended a permanent divestment of a right of action in all matters to which the statute relates, when it had run against them, and they had thereby become barred. And while it may be, as I have already suggested, that the reasoning of the court is correct, yet the wisdom of the doctrine announced is questionable.²

There is another rule that must be borne in mind in reference to all statutes, which is, that they are to be so construed as to have a prospective effect merely, and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed;³ and

not, revive those already barred, *Bradford v. Strine*, 13 Fla. 393; *Rogers v. Handy*, 24 Vt. 620; *Winston v. McCormick*, 1 Smith (Ind.), 8; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Morford v. Cook*, *ante*; *Garfield v. Bemis*, 2 Allen (Mass.), 445; *Baldro v. Tomlie*, 1 Oreg. 176; *Jay v. Thompson*, 1 Doug. (Mich.) 373; *Hill v. Knickie*, 11 Wis. 442; *Sprecker v. Wakely*, *id.* 432; *Hawkins v. Campbell*, 5 Ark. 512; *Cauch v. McKee*, *id.* 484; *Wires v. Farr*, 25 Vt. 41; *Walker v. Bank*, 6 Ark. 561; *Davis v. Minor*, 1 How. (Miss.) 183; *Rabb v. Harland*, 7 Penn. St. 292; *Stipp v. Brown*, 2 Ind. 647; *Clark v. Bank*, 10 Ark. 512; *Brown v. Wilcox*, 14 S. & M. (Miss.) 127; *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Forsyth v. Ripley*, 2 Greene (Iowa), 181; *Knox v. Cleaveland*, 13 Wis. 245; *Dillon v. Dougherty*, 2 Grant's Cas. (Penn.) 99; *Yancey v. Yancey*, 5 Heisk. (Tenn.) 353; but acts only on existing rights, *Cox v. Davis*, 17 Ala. 714; *Chandler v. Chandler*, 21 Ark. 95; *Henry v. Thorpe*, 14 Ala. 103; *Coady v. Reins*, 1 Mon. T. 424.

¹ *Campbell v. Holt*, 105 U. S. 620.

² *Martin v. Martin*, 35 Ala. 560; *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344; *Kinsman v. Cambridge*, 121

Mass. 528; *Atkinson v. Dunlap*, 50 Me. 511; *Dyer v. Gill*, 32 Ark. 410; *Wilmington v. George*, 5 Col. 80; *Mere, &c. v. Sehner*, 37 Md. 180; *Ludwig v. Stewart*, 32 Mich. 27; *Power v. Telford*, 60 Miss. 195; *Pitman v. Bump*, 5 Oreg. 15; *Rockport v. Walden*, 54 N. H. 167. See notes pages 24 to 35.

³ *Com. v. Sudbury*, 106 Mass. 268; *Whitman v. Hapgood*, 10 Mass. 437; *Garfield v. Bemis*, 2 Allen (Mass.), 445; *Jarvis v. Jarvis*, 3 Edw. Ch. (N. Y.) 462; *People v. Supervisors of Columbia*, 43 N. Y. 130; *People v. Supervisors of Ulster*, 63 Barb. (N. Y.) 83; *New York, &c. R. R. Co. v. Van Horn*, 57 N. Y. 473; *Hoch's Appeal*, 72 Penn. St. 53; *Oliphant v. Smith*, 6 Watts (Penn.), 449; *Philadelphia v. Passenger R. R. Co.*, 52 Penn. St. 177; *Steckel's Appeal*, 64 *id.* 493; *Journey v. Gibson*, 56 *id.* 57; *State v. Vreeland*, 34 N. J. L. 438; *Belvidere v. Warren R. R. Co.*, *id.* 193; *Baldwin v. Newark*, 38 *id.* 158; *Ex parte Graham*, 13 Rich. (S. C.) 277; *Finney v. Ackerman*, 21 Wis. 268; *Hopkins v. Jones*, 22 Ind. 210; *Miller v. Com.*, 5 W. & S. (Penn.) 488; *Benjamin v. Eldridge*, 50 Cal. 612; *Smith v. Humphrey*, 20 Mich. 398; *Stanbaugh v. Snoblin*, 32 *id.* 296; *Harrison v. Metz*, 17

under this rule a change in the statute of limitations would not affect existing claims, unless such is clearly the intention of the legislature; and especially would this be the case where actions are pending upon such claims when the statute is passed.¹ And if the statute is to have such effect, either by necessary inference or from its express terms, it is held by some of the cases to be void, unless it gives a reasonable time for bringing actions before it goes into operation;² but, upon the theory that the statute only relates to the remedy, it would seem that it is competent for the legislature to repeal the statute *in toto*, and make such repeal operative as to all existing claims upon which the statute has not run.³ The courts, however, make an important exception as to the power of the legislature to change the law of limitations as to existing rights, which is, that it has not the power to shorten the

id. 377; *Ludwig v. Stewart*, 32 *id.* 27; *Price v. Hopkins*, 13 *id.* 318.

¹ *Hooker v. Hooker*, 18 *Miss.* 599; *Battles v. Fobes*, *ante*; *Wright v. Oakley*, 5 *Met. (Mass.)* 400. Thus, in Massachusetts, where the statute was silent as to the matter, it was held that a statute which shortened the period of limitations of actions by creditors against executors or administrators from four to two years did not apply to executors or administrators who gave bonds before the law took effect. *King v. Tirrell*, 2 *Gray (Mass.)*, 331.

² *Call v. Hagger*, 8 *Mass.* 430; *Willard v. Harvey*, 24 *N. H.* 344; *Blackford v. Peltier*, 1 *Blackf. (Ind.)* 36; *Cook v. Kimball*, 13 *Minn.* 324; *Osborn v. Jaines*, 17 *Wis.* 573; *Proprietors, &c. v. Laboree*, 2 *Me.* 294; *Maltby v. Cooper*, 1 *Morr. (Iowa)* 59; *Society v. Wheeler*, 2 *Gall. (U. S. C. C.)* 141. In *State v. Vreeland*, 34 *N. J. L.* 438, it was held that an act which merely limits the time within which an action shall be brought will not apply to a suit pending when the act goes into effect, although it was not brought until after the act was passed. *Black v. Swanson*, 49 *Ga.* 424. In *Libbett v. Maulsby*, 71 *N. C.* 345, it was held that, where the right of action by a *cestui que trust* accrued prior to the adoption of the code in August, 1868, the limitation prescribed therein did not apply, but was governed by the law as it stood before the enactment of the code; and that, as there was no statute limiting the time when such actions should be commenced, it was left to the principles established by courts of equity in such

cases. In *Sohn v. Watterson*, 17 *Wall. (U. S.)* 596, it was held that a statute of limitations may have effect upon actions which have already accrued to the day of passage as well as upon those which accrue afterwards, but that such will not be presumed to be the intent of the legislature. That, ordinarily, the true rule for applying a statute of limitations to rights of action already accrued is to allow the party the statutory time for suing, computing it from the passage of the act, to consider the limitation as commencing at the time when the cause of action is first subjected to the operation of the statute of limitations. In *Sampson v. Sampson*, 63 *Me.* 328, it was held that it was competent for the legislature to shorten the period of limitations as to existing claims provided sufficient time is allowed for bringing actions thereon before the statute runs.

³ *Conkey v. Hart*, 14 *N. Y.* 22; *Stocking v. Hunt*, 3 *Den. (N. Y.)* 274; *Hill v. Boyland*, 40 *Miss.* 618. Statutes of limitation pertain to the remedy, and not to the essence of the contract; and it is in the power of the State legislatures to regulate the remedy and modes of proceeding in relation to past as well as future contracts, subject only to the restriction that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon its enforcement new burdens and restrictions which materially impair the value and benefit of the contract. *Briscoe v. Anketell*, 28 *Miss.* 361; *Swickard v. Bailey*, 3 *Kan.* 507; *Nelson v. Snorth*, 1 *Overt. (Tenn.)* 33.

period of limitation upon municipal bonds issued for sale in a foreign market. In such cases, the statute in force when the bonds were issued is treated as being a part thereof, so that it cannot, as to such bonds, be repealed;¹ and especially would this be the case if the limitation was fixed by the statute authorizing the issue of the bonds.

SEC. 12. **What Statute governs.** — If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs. That is, the period provided by the new law must run upon all existing claims, in order to constitute a bar.² In other words, the statute in force at the time the action is brought controls,³ unless the time limited by the

¹ *Peerless v. City of Watertown* (Wis.), 6 Biss. (U. S. C. C.) 79.

² *Henry v. Thorpe*, 14 Ala. 103; *Martin v. Martin*, 35 id. 560; *Howell v. Howell*, 15 Wis. 55; *United States v. Ballard*, 8 McLean (U. S.), 469; *Forsyth v. Ripley*, 2 Greene (Iowa), 181. But see *Pollard v. Tait*, 38 Ga. 439. In *Gilman v. Cutts*, 23 N. H. 376, an action was brought on a note dated Oct. 1, 1838, payable on demand. The plaintiff brought his action Jan. 27, 1849. A new statute of limitations took effect March 1, 1843, at which time the note was not barred by the old statute. The court held that the new statute was the one applicable to the action. In *Indiana*, it is said to be a general rule that the statute in force at the commencement of the action controls. *State v. Clark*, 7 Ind. 468. See also *Moore v. Lobbin*, 26 Miss. 394; *Hazlett v. Critchfield*, 7 Ohio (Part 2), 153.

³ *Patterson v. Gaines*, 6 How. (U. S.) 556; *Marston v. Seabury*, 3 N. J. L. 435; *Pritchard v. Spencer*, 2 Ind. 486; *Root v. Bradley*, 1 Kan. 430; *Walker v. Bank of Mississippi*, 7 Ark. 500; *Phares v. Walters*, 6 Iowa, 106; *Moore v. Lobbin*, 26 Miss. 394; *Gilman v. Cutts*, 23 N. H. 376. Provided a reasonable time has been given for the bringing of actions upon existing claims. *Sampson v. Sampson*, 63 Me. 328. In *Guilotell v. Mayor of New York*, decided by the New York Court of Appeals, Jan. 7, 1882, 25 Alb. Law Jour. 315, in an action for personal injuries caused by a defective sidewalk, it appeared that the injury occurred in 1873. At that time,

by the former code, the limitation was six years. "By the charter of New York a demand must be made upon the comptroller, requiring him to adjust a demand against the city thirty days before bringing an action thereon." On the 26th of May, 1876, the code was amended so as to limit an action for an injury to the person to one year after its accruing. This amendment was to take effect July 1, 1876. Plaintiff commenced this action in March, 1877. It was held that, irrespective of the question of the power of the legislature to enact statutes of limitation that operate retrospectively, the statutes of six years and not that of one applied to plaintiff's right of action. The provisions of section 73 of the old code, that "this title shall not extend" "to cases where the right of action has already accrued, but the statutes now in force shall be applicable to such cases," were not limited to the date of the adoption of that code, but operated prospectively. The words "already" and "now" in that section are to be taken distributively, and apply not merely to the date of the original enactment, but to any subsequent amendment as of the date of such amendment. Causes of action "already accrued" are intended and saved, and the "statutes now in force" applied as well at the date of a change effected by an amendment as at the date of the change accomplished by the original law. In *Ely v. Holton*, 15 N. Y. 595, in construing another section of the old code, this court gave such distributive character to the use of the word "thereafter," hold-

old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar.¹ The question, however, as to whether the statute is to have a retrospective operation is one of construction, to be determined from the language of the act and the intention of the legislature to be gathered from the act itself and the subject-matter to which it applies; the rule being, as previously stated, that a statute will not be permitted to have a retrospective operation unless such was clearly the intention of the legislature.²

In a Georgia case,³ where a statute was passed Jan. 1, 1863, providing for the acquisition of title to land by prescription as a substitute for a previous statute, the court held that possession which had been running before that act was passed, and was ripening into a title, was not lost, as such was not the evident intention of the legislature, and the defendant was permitted to tack the time already passed to that required by the new statute.⁴ In Michigan,⁵ a statute passed in 1867 provided that "every action upon a judgment rendered in a court of record of the United States, or this or any other State, shall be brought

ing it to apply at the date of the enactment, and also at the date of an amendment. See also *Matter of Peugnet*, 67 N. Y. 444. See *Acker v. Acker*, 80 N. Y. 143, where it was held that unless the new statute saves existing claims from its operation, it applies to them as well as others. A harsh and unreasonable inference of legislative intention is not to be drawn, when the language of the act fairly and naturally admits of one not only more just and wise, but in better harmony with an intention already expressed, and a general system intended to be consistent and uniform. Plaintiff's action was not barred by the amendment of 1876.

¹ *Baldro v. Tolmie*, 1 Oreg. 176; *Bradford v. Brooks*, 2 Aik. (Vt.) 284; *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Woart v. Winnick*, 3 N. H. 473; *Lewis v. Webb*, 3 Me. 326; *Holden v. James*, 11 Mass. 396; *Piatt v. Vittier*, 1 McLean (U. S.), 146; *Davis v. Minor*, 2 Miss. 183; *Stipp v. Brown*, 2 Ind. 647. In *Kinsman v. City of Cambridge*, 121 Mass. 558, it was held that the statute of 1874, extending the time for filing a petition for damages for land taken to widen a street, did not revive an action already barred by the statute existing before the new act was passed.

² For instances in which it has been held that a statute of limitation does not apply to causes of action which existed before its passage, see *Weber v. Manning*, 4 Mo. 229; *Thompson v. Alexander*, 11 Ill. 54; *Hall v. Minor*, 2 Root (Conn.), 223; *Central Bank v. Solomon*, 20 Ga. 408; *Paddleford v. Dunn*, 14 Mo. 517; *Ashbrook v. Quarles*, 15 B. Mon. (Ky.) 20; *Moore v. McLendon*, 10 Ark. 512; *Calvert v. Lowell*, id. 147; *Deal v. Patterson*, 12 La. An. 602; *Stine v. Bennett*, 13 Minn. 153; *Whitworth v. Ferguson*, 18 La. An. 60. In *Eaton v. Supervisors of Manitowac*, 40 Wis. 668, an act prescribing a new limitation of time for suing a county to recover back sums of money paid to it upon illegal tax certificates was passed in April, 1867, but was not to take effect until Jan. 1, 1868; and the court held that the purpose and effect of this provision was to prevent the bar of the statute taking effect upon rights of action acquired before Jan. 1, 1868, and that this was a reasonable period within which to bring an action.

³ *Pollard v. Tait*, 38 Ga. 439.

⁴ But see *Henry v. Thorpe*, 14 Ala. 103, where a contrary rule was established.

⁵ *Harrison v. Metz*, 17 Mich. 377.

within ten years next after the judgment was entered and not afterwards; and any action upon such judgment which shall not be commenced within the time above specified shall be forever thereafter barred," was held to be prospective and applicable only to judgments rendered after the act took effect. In Pennsylvania, an act of limitation was passed in 1785, making twenty-one years' adverse possession of lands necessary to give title to the person in possession, and it was held that the act was retrospective, and applied as well to rights then existing as to those afterwards arising.¹ In Massachusetts, in an early case,² SHAW, C. J., in discussing the question as to whether a person has a vested right to plead the statute, intimated that it might not be proper in technical strictness to say that he had, especially to the extent that it could not be taken away by the legislature. But in that case, while the court expressed a doubt upon this point, it nevertheless refused to give such an application to the statute under consideration, or to admit that the legislature possessed the power to take away such right after the bar had become complete. And in a later case before the courts of that State³ the same doubt upon this question was expressed. But whatever doubt may exist upon this point in Massachusetts, the courts elsewhere have entertained none, but have universally held that, after the statute bar has become complete, the debtor has acquired a vested right under these statutes, which the legislature cannot defeat or take away by subsequent legislation.⁴

There is much ground for argument upon either side of this question, and many plausible reasons can be advanced both for and against the general doctrine held as indicated *supra*. It is generally conceded that these statutes only relate to the remedy, and do not operate to extinguish the right. In other words, they are not treated as elements entering into the contract, so that the legislature is precluded from shortening or lengthening the period of limitation at any time before the bar has become complete.⁵

SEC. 13. Effect of Change of Statute as to Crimes. — In reference to crimes, where the statute fixes a period within which an indictment for certain offences shall be found, while perhaps it cannot technically

¹ *Parker v. Gonsalus*, 10 S. & R. (Penn.) 147.

² *Wright v. Oakley*, 5 Met (Mass.) 400.

³ *Ball v. Nye*, 99 Mass. 38.

⁴ *Atkinson v. Dunlap*, 50 Me. 111; *Bogg's Appeal*, 43 Penn. St. 512; *Ryder v. Wilson*, 40 N. J. L. 9; *Sprecker v. Wakeley*, 11 Wis. 432; *Baldro v. Tolmie*, 1 Oregon, 176; *Piatt v. Vittier*, 1 McLean (U. S. C. C.), 146; *Holden v. James*, 11 Mass. 396; *Woart v. Winnick*, 3 N. H. 478; *Bradford v. Brooks*, 2 Aiken (Vt.),

284; *Lewis v. Webb*, 3 Me. 326; *Woodman v. Fulton*, 47 Miss. 682; *Naught v. O'Neal*, 1 Ill. 36; *Girdner v. Stephens*, 1 Heisk. (Tenn.) 280; *Parish v. Eager*, 15 Wis. 532; *Stipp v. Brown*, 2 Ind. 647; *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Martin v. Martin*, 35 Ala. 560.

⁵ *Gilman v. Cutts*, 23 N. H. 376; *Martin v. Martin*, 35 Ala. 560; *Howell v. Howell*, 15 Wis. 55; *Cook v. Kendall*, 13 Minn. 324; *Forsyth v. Ripley*, 2 Greene (Iowa), 181.

be said that the criminal, by the lapse of the statutory period, has acquired a vested right under the statute, yet it may be said that while the State retained the power to prosecute and punish for the crime at any time before the statute had run thereon, by having neglected to do so it is at least treated as having condoned the crime, so that it is afterwards estopped from prosecuting for it, as much as it would be from withdrawing an absolute and unconditional pardon after it had once been granted and delivered. But it has recently been held by a court of high authority in this country that the same principle applies in this respect in criminal as in civil cases.¹ "Before committing any offence," says DIXON, J., in a very able and exhaustive opinion in the case referred to, "the citizen had a natural and absolute right to life and liberty. By his offence the State acquired the right to deprive him of either to the extent prescribed by the violated law. The citizen remained in the possession of life and liberty, but his possession was liable to be disturbed by means of a prosecution to be instituted by the State according to law. His offence, however, was local, and subjected his possession to impairment only within the jurisdiction whose laws he had broken. In these respects the relation between the offender and the State corresponds to that between one having the possession of lands, without the right of possession, and one entitled to invade that possession by action at law. In both cases there is a right of suit which must be pursued, if at all, within and under the laws of a single jurisdiction, and in both cases the wrong-doer holds a possession which only such legal prosecution can take away.

"In view of this position of things the statute of limitation declares that no person shall be prosecuted, tried, or punished for an offence, unless the indictment be found within two years after the crime. This in effect enacts that when the specified period shall have arrived the right of the State to prosecute shall be gone and the liability of the offender to be punished — to be deprived of his liberty — shall cease. Its terms not only strike down the right of action which the State had acquired by the offence, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the remedy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the State has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the

¹ Moore v. State, 40 N. J. L. 384.

same force regarding crimes, they annihilate the State's power to punish, and restore the offender's rights to their original status."

And the court further held that this condition is unassailable by subsequent legislation, repudiating the doctrine advanced by Mr. Bishop¹ in the work referred to, that a criminal statute of limitation simply withholds from the courts jurisdiction over the offence after the specified period, and that it is competent for the legislature to revive the old jurisdiction, or create a new one, when the prosecution may proceed. The doctrine stated by this text-writer is not only without any foundation in reason, but is also wholly unsustained by authority.

DIXON, J., in the case last cited, in commenting upon this statement, pertinently said: "Evidently this doctrine would upset the uniform train of decisions in civil causes, and, moreover, it would be a strained and unnatural construction of our act, to say that it simply withholds jurisdiction from the courts. Its language is, 'No person shall be prosecuted, tried, or punished.' It does not relate to the courts, but to the person accused. The answer, which under it the respondent must make to an accusation before the tribunal which once had the right to punish him, is not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that after inquiry the court must pronounce judgment or acquittal. And probably no one would contend that, after such judgment, any change in the law would legally subject the defendant to a second prosecution. Yet an acquittal by a court without jurisdiction is void.² It cannot be maintained, then, that the act impairs jurisdiction."

In reference to changes in the period of limitations made before the statute bar has become complete, it is held, in reference to criminal as in civil actions, that the legislature may in such cases either repeal, extend, or otherwise change the statute, and make it applicable to offences already committed.³ In the case last cited the legislature amended the statute relating to the limitation of the crime of forgery, so as to extend the period of limitation from two to five years. Previous to such change the crime with which the respondent was charged had been committed, and he claimed that the legislature had no power to change the statute so as to deprive him of the benefit of the statute existing when the crime was committed. But the court held otherwise, and GREEN, J., in passing upon this question, said: "At the time the act of 1877 was passed the defendant was not free from conviction by force of the two years' limitation of 1860. He therefore had acquired no right to acquittal on that ground. Now, an act of limitation is an act of grace purely on the part of the legislature. Especially is this the case in the matter of criminal prosecutions. The State makes no contract with criminals, at the time of the passage of

¹ Statutory Crimes, § 266.

² 1 Hawkins, P. C. c. 35.

³ Com. v. Duffy (Penn.), 23 Alb. L. J. 392.

an act of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are matters of public policy only. They are entirely subject to the will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare. Such being the character of this kind of legislation, we hold that, in any case where a right to acquittal has not been absolutely acquired by the period of limitation, that period is subject to enlargement or repeal, without being obnoxious to the constitutional prohibition against *ex post facto* laws." In New York such statutes are held not to apply to crimes committed before the statute was changed, unless expressly included therein, adopting the rule in that respect applicable in civil cases,¹ leaving the question as to what the rule would be where the statute is expressly applied to crimes already committed, but not barred, undecided.

SEC. 14. Rule when Title to Land is concerned. — When a title to land has been acquired by adverse possession under a statute, the legislature does not possess the power to destroy the same, and a repeal of the statute does not divest the title; but at any time before title has become vested it may be repealed or altered, either by shortening or lengthening the period required to make the title absolute.²

¹ *People v. Lord*, 12 Hun (N. Y.), 282.

² *Knox v. Cleveland*, 18 Wis. 245.

CHAPTER II.

WHAT ACTIONS ON SIMPLE CONTRACTS MAY BE BARRED.

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| <p>SEC. 15. No Limitation at Common Law.</p> <p>16. Causes of Action on Simple Contracts embraced by Statute of James I.</p> <p>17. Deposits with Bankers, within Statute of James.</p> <p>18. Distinction when Deposit is special.</p> <p>19. Illustrations of Application of Statute in Special Cases.</p> <p>20. Assumpsit, for what it lies.</p> | <p>SEC. 21. For Torts, Assumpsit lies, when.</p> <p>22. Lapse of Statutory Period does not give Title to Pledgee of Property, except.</p> <p>23. Clauses in the Several Statutes that cover Simple Contracts.</p> <p>24. Account. Nature of Action.</p> <p>25. Debt.</p> <p>26. Covenant.</p> <p>27. Suits in Admiralty.</p> <p>28. Crimes.</p> |
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SEC. 15. No Limitation at Common Law.—At the common law there existed, as we have seen, no limitation to the time within which an action *ex contractu* could be brought, notwithstanding a dictum of Bracton to the contrary.¹ In torts, indeed, the rule *actio personalis moritur cum persona*² prevailed, and on the death of either party the right of action was at an end. But in actions arising out of contract the right of action descended, and might exist in the plaintiff's representatives against the representatives of the defendant for an unlimited time. At length, however, the statute of 21 James I. c. 16, was passed, which

¹ "Omnes actiones infra calum finem habere debent." Bracton, Lib. 2. There is an old maxim to the contrary of this sometimes quoted, — "a right never dies."

In *People ex rel. Millard v. Chapin*, 104 N. Y. 96, reversing 40 Hun, 386, it was held, that the discretion of the court to grant or refuse a writ of mandamus is not absolute, but is governed by legal rules, and its exercise is subject to review here.

The sufficiency of the evidence upon which is based a decision of the State comptroller, as to who is entitled to the purchase money paid upon an invalid sale of land for taxes, which he is required to refund out of the State treasury, may not be reviewed by mandamus; nor can the decision, even if wrong, be so rectified.

The writ does not lie to compel an officer exercising judicial functions to make any

particular decision, or to set aside a decision already made. The mere record of a deed from the purchaser, at an invalid tax sale, is not notice to the comptroller of the right of the grantee to have the purchase money refunded to him.

Although the statute of limitations does not apply to the issuing of a writ of mandamus, the writ should not be granted after the period fixed by the statute as a bar to an action has expired, when the delay is unexplained and unaccounted for. And the writ may also, in the discretion of the court, be denied when the delay in moving it is unreasonable, although it falls short of the time allowed for commencing actions.

² The application of this rule has been much diminished by statute in some of the States of this country.

remains still in force in England, and substantially in this country, at least so far as section 3 of such act is concerned, so that the construction put thereon by the English courts will aid us materially in the construction of our statute. The third section of this statute is as follows: "And be it further enacted, that all actions of *quare clausum fregit*; all actions of trespass detinue, action *sur trover* and replevin for taking away of goods and cattle; all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, or imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed and not after; (that is to say), the said actions upon the case (other than for slander), and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suits and not after; and the said actions of trespass, assault, battery, or wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions and not after; and the said actions upon the case for words, within one year next after the end of this present session of Parliament, or within two years next after the words spoken and not after."

SEC. 16. Causes of Action on Simple Contracts embraced by Statute of James I. — The statute of James has been the subject of much judicial criticism, and has been described as a statute "worded very loosely."¹ But the circumstance that it has prevailed for so long a period without essential modification is much in its favor, although its beneficial operation is largely due to an extension of its benefits by liberal construction. Thus, although there is no express mention of the action of *assumpsit*, which was at the period of its enactment the most important of all actions, yet as it was clear that this omission was unintentional,² it was construed as embracing that action by fair intendment, and as

¹ PARKE, B., in *Inglis v. Haigh*, 8 M. & W. 769.

² DENMAN, C. J., in *Piggott v. Rush*, 4 Ad. & El. 912, said: "It seems to be hardly disputed that the plaintiff may recover if *assumpsit* for unliquidated damages be within the proviso in the seventh section. *Indebitatus assumpsit* is held to be so in *Chandler v. Villette*, 2 Saund. 120, and in *Crosier v. Tomlinson*, 2 Mod. 71, *assumpsit* is said to be included in trespass. That

is certainly rather strong. Yet if *assumpsit* were omitted from the proviso, the omission was palpably so unintended that the courts perhaps were justified in straining the language." The other judges, LITLEDALE, PATTESON, and COLERIDGE, based their assent on the ground that they could not overrule the cases, and intimated that if that had been a case of first impression the rule would be different.

coming within the reason of the statute, and also as coming under the head of trespass on the case.¹ So, too, although the saving clause in cases of disability does not in terms mention any actions on the case except actions on the case for words, yet it has always been construed as extending to all actions on the case, from the manifest inconvenience of a contrary construction.²

As construed by the courts, this section is comprehensive, and comprises nearly all simple contracts, or causes of action which fall under the head of assumpsit. Foreign judgments, ranking only as simple-contract debts, come under this head;³ so also do promissory notes, bills of exchange, checks,⁴ and all written contracts or obligations not under seal or of record,⁵ as well as all unwritten or parol contracts upon which an action of assumpsit may be predicated.⁶ Actions by attorneys to recover their fees are within the section; for though the status of an attorney is, "of record," yet his fees are not of record.⁷ But the lien of an attorney on deeds in his possession for his costs may, of course, remain after the statutory period.⁸ The rule as to an attorney's bill may be said to be that it is subject to the statute, and that it only becomes due so that the statute begins to run thereon from the time judgments are entered and executions issued.⁹ In other words, so long as anything remains to be done by him to protect the interests of

¹ *Harris v. Saunders*, 4 B. & C. 411; *Bacon's Abr.*, tit. Limitations (E), 1; *Leigh v. Thornton*, 1 B. & Ald. 625; *Beatty v. Burnes*, 8 Cr. (U. S.) 98; *Chandler v. Villette*, 2 Saund. 120; *Haven v. Foster*, 9 Pick. (Mass.) 112; *Crosier v. Tomlinson*, 2 Mod. 71; *Baldro v. Tomlie*, 1 Oreg. 176; *Williams v. Williams*, 5 Ohio, 444; *Maltby v. Cooper*, 1 Morris (Iowa), 59. In *Phillips v. Cage*, 12 S. & M. (Miss.) 141, it was held that actions of assumpsit upon open accounts are not embraced under the words "actions of account and upon the case," but that they relate only to special actions of that character.

² *PARKE, B.*, in *Inglis v. Haigh*, 8 M. & W. 780; *Chandler v. Villette*, 2 Saund. 120.

³ *Duplex v. De Roven*, 2 Vern. 540; *Harris v. Saunders*, 4 B. & C. 411; *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132; *Bissell v. Hall*, 11 id. 168; *Pease v. Howard*, 14 id. 470; *Hay v. Fisher*, 2 M. & W. 722; *Walker v. Witter*, Doug. 1. But in Pennsylvania it has been held that a plea of *actio non accrevit infra sex annos* is not a good plea when the judgment is founded on a specialty. *Richards v. Bickley*, 13 S. & R. (Penn.) 395.

⁴ *Chievly v. Bond*, 4 Mod. 105; *Brush*

v. Barrett, 16 Hun (N. Y.), 409, affirmed 82 N. Y. 300. The taking of a note, bill of exchange, or check is *prima facie* evidence of payment of a debt for which it is given, but does not necessarily operate as a discharge of such debt. *Wallace v. Agry*, 4 Mas. (U. S. C. C.) 336; *Lord v. Bigelow*, 127 Mass. 185; *Amos v. Bennett*, 125 id. 120; *Swett v. Southworth*, id. 439; *Graves v. Shulman*, 59 Ala. 406; *Feamster v. Withrow*, 12 W. Va. 611; and the nature of the transaction and what transpired at the time is generally conclusive upon this question, *Cadiz Bank v. Slemmons*, 34 Ohio St. 142; *McKee v. Hamilton*, 33 id. 7. Bills and notes are not such matters of account as are referred to in the statute under the head of "merchants' accounts," but are rather to be regarded as "accounts stated." *Chievly v. Bond*, 4 Mod. 105.

⁵ *Mill-dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

⁶ *Hall v. Hall*, 8 N. H. 129.

⁷ *Oliver v. Thomas*, 3 Lev. 367.

⁸ *In re Broomhead*, 5 D. & S. 52.

⁹ *Pruyn v. Comstock*, 56 Barb. (N. Y.) 9; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 id. 306.

his client in the litigation or matter out of which his claim arises, his claim for services is saved from the operation of the statute.¹ Actions of assumpsit by a bankrupt's assignees were held within the section, on the ground that, notwithstanding that the assignment was by statute, yet the assignees could only stand in the bankrupt's place, and have what right and remedy he had.² Money lent on a deposit of title-deeds creates only a simple-contract debt; but this is subject of course to the question of lien.³ The liability of an equitable assignee of leaseholds for the covenants thereon is within the section.⁴

SEC. 17. **Deposits with Bankers, within Statute of James.** — The ordinary dealings of bankers and customers also fall within the section, inasmuch as sums paid to the credit of a customer with his banker, though usually called deposits, are in truth loans to the banker;⁵ and it is a fallacy to liken the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance, as money paid to a banker becomes at once a part of his general assets, and he is merely a debtor for the amount. In fact, money deposited with a banker by his customer in the ordinary way is money lent to the banker, with a superadded obligation that it is to be paid when called for by check;⁶ and consequently if it remains six

¹ *Hale v. Ard*, 48 Penn. St. 22; *Lichty v. Hugus*, 55 id. 434. In *Foster v. Jacks*, 4 Watts (Penn.), 334, it was held that the statute does not commence to run against an attorney's claim so long as the debt which the attorney seeks to collect is unpaid. In *Coleman v. Whitney*, 62 Vt. 123, the complainant brought a bill in equity to enforce a mortgage which was given to secure the performance of an agreement for her support during life. The mortgage was given by her brother, and the agreement entered into twenty-seven years before the action was brought, and during all that time she had slept upon her rights, and never called upon her brother to carry out the agreement; nor, although she lived in his family for about eleven years after the agreement was made, and had a settlement with him, and took his note for \$800, as the result of such settlement, did it appear that the subject of carrying out the agreement was ever referred to. The court held that the statute had not run against the agreement, and that she had not been guilty of such *laches* as defeated her remedy thereon. The ground upon which the court placed its decision was, that there was no breach of the contract until she had called upon her brother for support.

² *Bac. Abr. Lim. (E)* 1; *South Sea Co. v. Wymondsell*, 3 P. W. 144. And see *Index, S. C. Bankruptcy*.

³ *Brocklehurst v. Jessop*, 7 Sim. 438.

⁴ *Sanders v. Benson*, 4 Beavan, 450.

⁵ *Foley v. Hill*, 1 Phill. 399; *Pott v. Clegg*, 16 M. & W. 321; *Carr v. Carr*, 1 Mer. 541, n.; *Devayue v. Noble*, id. 568.

⁶ *Wray v. Tuskegee Ins. Co.*, 34 Ala. 58; *Robinson v. Gardner*, 18 Gratt. (Va.) 509. Deposits made with bankers may be divided into two classes: 1. Those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and, 2. That kind peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money, and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252.

In the case of a general deposit, banks are authorized to use, in discounting, &c., the money deposited, as a temporary loan, liable to be withdrawn at any moment by the depositor, the deposit being a debt due from the bank to the depositor, which raises an implied assumpsit for its repay-

years without payment of principal or interest, the right to recover it in England is held to be barred. And this is the case even although there is an agreement to pay interest, which it is the banker's duty to enter to his customer's credit;¹ and in the case cited in the last note it was held that notwithstanding that the debt of a bank to customers is one of a special nature, and for which no action can be brought without a previous demand, yet the statute runs within the period fixed for the limitation of such claim if no demand is made.² But in a Delaware

ment; in the case of a special deposit they have no such right. *Foster v. Essex Bank*, 17 Mass. 479; *Matter of Franklin Bank*, 1 Paige (N. Y.), 249; *Bank of Kentucky v. Wister*, 2 Pet. (U. S.) 318; *Albany Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Dawson v. Real Estate Bank*, 5 Ark. 283.

In the case of a general depositor, the money, checks, or bills which he deposits become the property of the bank, and he becomes a creditor. If they are stolen, lost, or destroyed, or become of no value, the bank sustains the loss, and he is still a creditor. He has no claim upon the money or bills deposited. The officers may use them as they please, for the general purposes of the institution, and he is, to all intents, a general creditor to the bank. There is an implied assent on the part of the depositor, and the agents of the institution are legally authorized to issue bills and discount notes on the credit of such deposits. The depositor, therefore, has no valid claim to be paid in preference to the bill-holders, who are also general creditors. *Matter of Franklin Bank*, 1 Paige (N. Y.), 249; *s. p. Ellis v. Linck*, 3 Ohio St. 66.

¹ In *Pott v. Clegg*, 16 M. & W. 321, POLLOCK, C. B., in discussing this question, said: "The question in this case is, how far the defendant is entitled to avail himself of an old banking account, on which a large balance has been standing for many years, and to which the statute of limitations would apply under ordinary circumstances. And a question arose whether this could be considered in any other light than an ordinary debt, there being, undoubtedly, several authorities in which it is distinctly laid down that money deposited in a banker's hands is equivalent to money lent; and the majority of the court are of that opinion. I entirely con-

cur in the judgment of the rest of the court, that the set-off in the present case cannot be made available; for even assuming that this account ought not to be treated as money lent, but that there are peculiar circumstances in a banking account which distinguish it from any other, yet none of those circumstances appear on these pleadings, so as to justify us in considering this case differently from what we should if it were an ordinary case of money lent; and I therefore concur with the rest of the court, that the present rule must be discharged. At the same time, I must, certainly with considerable doubt and diffidence, confess the hesitation of my own opinion, whether there is not special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money. It seems to me that it is a question for the jury, who ought to decide what is the liability of the banker, and whether the money deposited with him is money lent or not. I could not concur in the judgment of the rest of the court without expressing this doubt, in which, however, they do not partake, as they are of opinion that money in the hands of a banker is merely money lent, with the superadded obligation that it is to be paid when called for by the draft of the customer." PARKE, ALDERSON, and ROLFE were the other members of the court. See *Thompson v. Bank of North America*, 82 N. Y. 1, where it is held that the statute does not begin to run on a deposit until a demand has been made. *Foley v. Hill*, *ante*. But in the latter case there was no charge in the bill that the bankers had fraudulently or through gross carelessness omitted their duty to enter the interest.

² Pothier on Contracts, quoted in *Pott v. Clegg*, 16 M. & W. at p. 325.

case,¹ it was held that an action will not lie against a bank for a deposit, until after a demand has been made therefor; and such seems to be the rule generally adopted in this country.² The engagement of a bank with its depositors is not to pay absolutely and immediately, but when payment shall be required at the banking-house, and therefore it is not in default or to respond in damages until demand and refusal; nor does the statute of limitations begin to run until demand has been duly made.³ But if the bank has rendered an account claiming the deposit as its own,⁴ or if it has suspended payment and closed its doors against its creditors,⁵ or has done any act that operates as a notice of its intention not to pay the deposit, a demand is dispensed with, and the statute begins to run from the date of such act.⁶ In an English case, *POLLOCK, C. B.*, suggested a doubt whether the question was not one for jury to decide whether money so lent were a loan or deposit.⁷

SEC. 18. Distinction when Deposit is special. — The case is different where the banker has notice that the fund is a trust fund, even though he has no notice what are the particular trusts,⁸ or where money is deposited in a sealed bag, or which may otherwise be ear-marked and recovered *in specie*.⁹ The liability of an attorney for money of his client which has come to his hands, in the absence of fraud, is simply that of an agent or factor, and creates a simple-contract debt only.¹⁰

¹ *Johnson v. Farmers' Bank*, 1 Harr. (Del.) 117.

² *Downes v. Bank of Charlestown*, 6 Hill (N. Y.), 297.

³ *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92; *Adams v. Orange County Bank*, 17 Wend. (N. Y.) 514.

⁴ *Bank of Missouri v. Beroist*, 10 Mo. 519.

⁵ *Watson v. Phenix Bank*, 8 Met. (Mass.) 217.

⁶ *Farmers' Bank v. Planters' Bank*, 10 G. & J. (Md.) 422.

In *Bank of British North America v. Merchants' Nat. Bank of New York City*, 91 N. Y. 106, it appeared that on March 9, 1870, plaintiff, who had a deposit account with defendant, drew its check payable to the order of H. On the same day the check was certified by the defendant's teller. On the next day it was presented by some person other than H., with her indorsement forged thereon, and was paid by the defendant and the amount thereof charged to the plaintiff. On March 17, 1870, in accordance with the usual course of dealing between the parties, the plaintiff's pass-book was written up, balanced, and returned; it contained the charge of

the check, which was also delivered up as a voucher. The plaintiff had no notice or knowledge of the forgery until January, 1877; in June thereafter, it tendered the check and demanded of the defendant payment of the amount thereof, and brought this action to recover the same in November, 1877. It was held, that the action was not barred by the statute of limitations; that the certification did not make the check due without demand; that the payment upon the forged indorsement discharged no part of defendant's indebtedness; that plaintiff lost none of its rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account, and when it discovered the mistake, had the right to repudiate the charge, return the check, and claim payment.

⁷ *Pott v. Clegg*, *ante*.

⁸ *Bridgman v. Gill*, 24 Beav. 302.

⁹ *Carr v. Carr*, 1 Mer. 541, n.; *Devayne v. Noble*, *id.* 568.

¹⁰ *McCoon v. Galbraith*, 29 Penn. St. 293; *In re Hindmarsh*, 1 Dr. & Sw. 129; *Burdick v. Garrett*, 5 Ch. 233; *Watson v. Woodman*, L. R. 20 Eq. 731.

The rule is that where an attorney collects money for his client, the statute begins to run from the time of its receipt, and that, too, without regard to notice to, or a demand by, the client.¹ But where the attorney has fraudulently concealed the fact that the claim is collected from his client, as if upon inquiry he informs him that it has not been collected, when in fact it has been, the statute does not begin to run except from the time when the client discovers the fraud. Thus, where a claim had been sent by an attorney to an agent in another State, and upon inquiry by his client he informed him that the claim was not collectible, when in fact it had been collected by such agent, it was held that the statute did not begin to run until the time of the discovery of the fraud, and that, too, whether the attorney was or was not acting in good faith when he gave the answer.² But where the plaintiff claimed against his attorney for money received on his behalf, the statute was held not to be a bar to the summary jurisdiction of the court.³ An action for mesne profits is held to be within the act.⁴

SEC. 19. Illustrations of Application of Statute in Special Cases. — Money due by virtue of a custom is within this act.⁵ So, too, is an action grounded on a by-law made by a company under its charter; on the ground, apparently, that although in one sense a by-law is grounded on the statute or charter which authorizes it, yet it only operates against an individual by virtue of his own assent.⁶ But, except where otherwise provided, actions founded directly upon a statute, a matter of record, or, in fact, any specialty, are not within the statute;⁷ but the rule is otherwise as to actions only indirectly founded upon a statute.⁸

¹ *Campbell v. Boggs*, 48 Penn. St. 524; *Alexander v. Westmoreland Bank*, 1 id. 395; *Fleming v. Culbert*, 46 id. 498; *Glenn v. Cuttle*, 2 Grant's Cas. (Penn.) 273.

² *Morgan v. Tener*, 83 Penn. St. 305. See also *Wickersham v. Lee*, id. 416.

³ *Ex parte Sharp*, W., W. & D. 354.

⁴ *Reade v. Reade*, 5 Ves. 749. In *Mitchell v. Mitchell*, 10 Md. 234, the court were equally divided upon the question, and the court below having held that the statute was a bar, the judgment stood. See *Morgan v. Varick*, 8 Wend. (N. Y.) 587, where the doctrine stated in the text was held.

⁵ *Mayor of London v. Gorry*, 2 Lev. 174; s. c. as *City of London v. Goree*, 1 Vent. 298; *Tobacco Company v. Loder*, 16 Q. B. 765.

⁶ *Feltmakers' Co. v. Davis*, 1 Strange, 385; *Barber Surgeons of London v. Pelson*, 2 Lev. 252.

⁷ *Cork & Bandon Railway Co. v. Goode*,

13 C. B. 286, where private property has been damaged by a public improvement, and the statute has given a remedy therefor, the statute of limitations does not apply, *Hannum v. West Chester*, 63 Penn. St. 475; nor does the statute apply to a statutory proceeding for the assessment of damages for the construction of a railroad, *McClinton v. Pittsburgh, &c. R. R. Co.*, 66 id. 404; *Delaware, &c. R. R. Co. v. Burson*, 61 id. 369; nor to a municipal assessment, *Magee v. Com.*, 46 id. 358; *Council v. Moyamensing*, 2 id. 224. But if a party resorts to his common-law remedy for such damages the statute applies. *McClinton v. Pittsburgh, &c. R. R. Co.*, ante. In *Knapp v. Clark*, 30 Me. 244, it was held that an action on a judgment recovered under the Mill Act was not within the statute.

⁸ *South Sea Co. v. Wymonsall*, 3 P. Wms. 144. Thus, an action of assumpsit lies upon an implied promise to discharge an obligation created by statute, *Bath v.*

or specialty. Thus, where an action for use and occupation lies for the recovery of the use of premises, although there is a lease under seal, the statute applies.¹ So, where a surety upon a bond is compelled to pay money thereon for his principal, the statute runs upon his claim therefor, although it arose out of his obligation under a specialty.² So, where a contract under seal is so executed as not to authorize a party injured by its breach to maintain an action thereon, he may bring assumpsit, and set up the contract by way of inducement.³ So, where the terms of a sealed instrument have been varied by parol, the instrument is thereby reduced from a specialty to a simple contract, and assumpsit lies for its breach, and consequently the statute applies.⁴ The statute applies to a set-off⁵ or any trust that is the ground of an action at law,⁶ to town or city orders,⁷ to a legacy not charged on land,⁸ to a vendor's lien,⁹ to actions against a sheriff for money collected on execution,¹⁰ and, indeed, every claim or demand that may be made the ground of an action of assumpsit. In this country, in all of the States the statute expressly or by fair inference embraces the action of assumpsit, as in Maine,¹¹ Vermont,¹² Massachusetts,¹³ Connecticut, New York, Delaware, Michigan, Wisconsin, Missouri, Arkansas, and Florida; while in Rhode Island, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, Iowa, California, Oregon, Minnesota, Kansas, Nevada, and Nebraska,¹⁴ the same class of actions is embraced under the head of

Freeport, 5 Mass. 326; unless some other remedy is expressly given, Hillsboro v. Londonderry, 43 N. H. 451; Watson v. Cambridge, 15 Mass. 286.

¹ Conover v. Conover, 1 N. J. Eq. 403.

² Penniman v. Vinton, 4 Mass. 276.

³ Hitchcock v. Lukens, 8 Port. (Ala.) 338.

⁴ Hydeville Co. v. Eagle R. R. & Slate Co., 44 Vt. 395; Mill-dam Foundry v. Hovey, 21 Pick. (Mass.) 417; Munroe v. Perkins, 9 id. 298.

⁵ Nolin v. Blackwell, 30 N. J. L. 170.

⁶ Winsor v. Barnet, 4 Wash. (U. S. C. C.) 631. The effect of the statute upon trusts will be made the subject of a separate chapter; but it may be stated here that the rule that the statute does not apply to cases where the technical relation of trustee and *cestui que trust* exists, only applies in cases over which courts of equity have exclusive jurisdiction, Cocke v. M'Ginnis, M. & Y. (Tenn.) 361; nor where the trustee disclaims the trust, Walker v. Walker, 16 S. & R. (Penn.) 379; nor to

implied trusts, Wilmerding v. Russ, 33 Conn. 67; but to open, continuing trusts the statute has no application, so long as the trust continues, Wilmerding v. Russ, *ante*; Johnston v. Humphries, 14 S. & R. (Penn.) 394; Seymour v. Freer, 8 Wall. (U. S.) 202; where, however, the fiduciary relation ceases, the relation of debtor and creditor exists, and the statute applies from that time, Bone's Appeal, 27 Penn. St. 492; Bull v. Lawson, 4 W. & S. (Penn.) 557. See chapter on TRUSTS. Constructive trusts are within the statute. Ashurst's Appeal, 60 Penn. St. 290.

⁷ People v. Lincoln, 41 Mich. 415.

⁸ Souzer v. De Meyer, 2 Paige Ch. (N. Y.) 574; American Bible Society v. Hebard, 41 N. Y. 619.

⁹ Borst v. Corey, 15 N. Y. 505.

¹⁰ Elliot v. Cronk, 13 Wend. (N. Y.) 35.

¹¹ Maine Rev. Stat. c. 146, § 9.

¹² Comp. Stat. c. 58.

¹³ Rev. Stat. c. 197.

¹⁴ See Appendix, statutes of the several States.

debt, case, or actions upon written or unwritten contracts. In Louisiana all personal actions are barred after thirty years;¹ while in Texas the statute embraces written contracts, and provides that they shall be barred in four years, and actions of debt upon contracts not in writing, in two years, which includes all that class of actions usually embraced under the head of assumpsit. Thus it will be seen that the construction put upon the statute 21 James I. by the English court is of material importance in the construction of our own, because while, as has already been said of the statute of James, it is "loosely worded," so the same observations are also applicable to some of our own statutes, and in nearly all of them there are many matters left to be supplied by intendment. In order to ascertain to what class of actions the statute applies, it is necessary to ascertain what classes of claims may be the foundation of assumpsit or debt.

SEC. 20. *Assumpsit, for what it lies.* — The action of assumpsit, as it formerly existed as an active remedy, and as it now exists in all the States in substance although not in form, was comprehended under the head of trespass on the case, and embraces all causes of action for the recovery of damages for the breach of any simple contract, oral or written, or express or implied,² as checks,³ promissory notes,⁴ payable either in money or specific articles,⁵ as bills of exchange,⁶ interest coupons upon municipal or other bonds,⁷ an award not under seal,⁸ any acknowledgment of an indebtedness, certificates of deposit,⁹ for work done under a special contract under seal, but not according to the covenant,¹⁰ or when the contract has been rescinded,¹¹ on the promise of a grantor to refund the purchase-money for land on account of a failure of title,¹² to recover for goods sold and delivered,¹³ for services rendered on express or implied request,¹⁴ for a breach of warranty, express or

¹ Griffith's Annual Register, 680.

² Carter v. Hope, 10 Barb. (N. Y.) 180; Howes v. Austin, 35 Ill. 396.

³ Hinsdale v. Bank of Orange, 6 Wend. (N. Y.) 84; Hughes v. Wheeler, 8 Cow. (N. Y.) 77; Woods v. Schroeder, 4 H. & J. (Md.) 276; Ellsworth v. Brewer, 11 Pick. (Mass.) 320; Tenny v. Sandborn, 5 N. H. 557; Eagle Bank v. Smith, 5 Conn. 71.

⁴ Payne v. Couch, 1 Greene (Iowa), 64; Stener v. Lamoure, H. & D. Supp. (N. Y.) 352; St. Louis, &c. Co. v. Souland, 8 Mo. 665.

⁵ Farmers', &c. Bank v. Payne, 25 Conn. 444.

⁶ Johnson v. Stark, 24 Ill. 25.

⁷ Brady v. Mayor, 1 Barb. (N. Y.) 584; Bates v. Curtis, 21 Pick. (Mass.) 247.

⁸ Morse v. Allen, 44 N. H. 33; Carver v. Hayes, 47 Me. 257.

⁹ Swift v. Whitney, 20 Ill. 144; State Bank v. Corwith, 6 Wis. 551.

¹⁰ Canby v. Ingersoll, 4 Blackf. (Ind.) 493.

¹¹ Bassett v. Sanborn, 9 Cush. (Mass.) 58; Hill v. Green, 4 Pick. (Mass.) 114.

¹² Miller v. Watson, 4 Wend. (N. Y.) 267.

¹³ Edmunds v. Wiggin, 25 Me. 505; Davis v. Sanders, 11 N. H. 259; Kingman v. Hotaling, 25 Wend. (N. Y.) 423.

¹⁴ James v. Buzzard, Hempst. (U. S. C. C.) 240. In Watchman v. Crook, 5 G. & J. (Md.) 246, it was held that assumpsit lies for work done under a contract under seal, though not according to the terms of the contract, if the work is accepted; but in such a case the action is for

implied,¹ for the breach of a contract of bailment,² for a subscription to the stock of a corporation;³ so for a refusal of a corporation to issue to the owner of stock a certificate thereof, or to recognize his rights as owner thereof,⁴ and for dividends due upon stock,⁵ for a pecuniary legacy not made a charge upon lands;⁶ and it seems that it lies against a devisee of land charged with the payment of a legacy or annuity when the obligation to pay becomes complete;⁷ so, too, it lies for the purchase-money agreed to be paid for land,⁸ for the recovery of money paid for the conveyance of land to which the grantor had no title or no power to convey,⁹ or under an agreement to convey land, but which the payee refuses or is unable to convey;¹⁰ and generally for money paid upon a consideration that has failed, whether it was paid under a simple contract or specialty,¹¹ or for money paid under false and fraudu-

the value of the services, and not upon the contract itself.

¹ *Evertsen v. Miles*, 6 Johns. (N. Y.) 138; *Kimball v. Cunningham*, 4 Mass. 505; *Byers v. Bostwick*, 2 Treadw. (S. C.) Const. 75; *Rew v. Barber*, 3 Cow. (N. Y.) 272.

² *Bank of Mobile v. Huggins*, 3 Ala. 206.

³ *Rensselaer, &c., Plank Road Co. v. Barton*, 16 N. Y. 457, n.; *Ogdensburgh, &c. R. R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Dayton v. Borst*, 31 N. Y. 435; *Barrington v. Pittsburgh, &c. R. R. Co.*, 34 Penn. St. 358.

⁴ *Wyman v. Am. Powder Co.*, 8 Cush. (Mass.) 168; *Gray v. Portland Bank*, 3 Mass. 364; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90.

⁵ *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243.

⁶ *Woodruff v. Woodruff*, 3 N. J. L. 552; *Clark v. Herring*, 5 Binn. (Penn.) 33; *Goodwin v. Chaffee*, 4 Conn. 163; *Knapp v. Hannaford*, 6 id. 176; *Cowell v. Oxford*, 6 N. J. L. 432.

⁷ *Swasey v. Little*, 7 Pick. (Mass.) 296; *Adams v. Adams*, 14 Allen (Mass.), 65; *Sheldon v. Purple*, 15 Pick. (Mass.) 528.

⁸ *O'Neale v. Lodge*, 3 H. & M. (Md.) 433; *Shephard v. Little*, 14 Johns. (N. Y.) 210; *Bowen v. Bell*, 19 id. 338; *Wood v. Gee*, 3 McCord (S. C.), 421.

Gallup v. Bernd, 132 N. Y. 370.

In an action, commenced in 1887, to recover an alleged balance unpaid by the purchase price of a farm sold and conveyed in 1880, by the plaintiff, to the defendant, the defendant set up as a counter-claim,

and the referee found in substance that the sale was by the acre, that the plaintiff represented that there were 230 acres in the farm, and relying thereon he agreed to pay for that number, that shortly before the commencement of the action he discovered that there were only about 211 acres. The referee found that the agreement was the result of a mutual mistake. The defendant demanded a reformation of the contract and an allowance for the deficiency. Held, that he was entitled to the relief sought. The plaintiff in reply to the counter-claim pleaded the statute of limitations. Held, untenable; that the contract having been executed, defendant had no relief, except in equity, and that the ten years limitation applied; and that the correction of the mistake sought for could be made as well upon answer as in a suit brought directly for that purpose.

⁹ *Shearer v. Fowler*, 7 Mass. 31; *Clafflin v. Godfrey*, 21 Pick. (Mass.) 1.

¹⁰ *Parker v. Tainter*, 123 Mass. 185; *White v. Wieland*, 109 id. 291; *Williams v. Bemis*, 108 id. 91; *Dix v. Marcy*, 116 id. 416.

¹¹ *Williams v. Reed*, 5 Pick. (Mass.) 482; *Lawrence v. Carter*, 16 id. 12; *Arthur v. Saunders*, 9 Port. (Ala.) 626. Thus, money paid for insurance when the policy never attached, *Hemmenway v. Bradford*, 14 Mass. 121; or under a deed which the person executing had no authority to make, *Clafflin v. Godfrey*, 21 Pick. (Mass.) 1; for freight or passage money when the voyage is broken up by a peril of the sea or otherwise, *Chase v. Alliance Ins. Co.*, 9 Allen (Mass.), 311.

lent representations,¹ by mistake.² It lies to recover an account stated,³ and also to recover a final balance due from one partner to another growing out of a settlement of the business of the firm,⁴ on a foreign judgment,⁵ for money accruing under a statute,⁶ by one cotenant against another who has received more than his share of the profits from the common property,⁷ and in all instances where book-account lies, when this remedy is given by statute.⁸

In very many of the States there is a general provision in the statutes limiting the right to bring an action of any kind after the lapse of a certain period. That is, after making special provision for the barring of certain classes of claims, there is a provision that all other actions shall be brought within a certain time. And where that provision exists of course all classes of actions, except those which are specifically provided, in the statute, are embraced under this head, and no question can arise as to the applicability of the statute. But in the States where no such general provision exists, questions often arise as to whether certain classes of actions are embraced under any of the special heads covered by the statute. Thus, in Tennessee, it is held, that the statute does not apply to an action brought by a person in possession of land to set up a lost deed, the reason being that the suit is not for the recovery of land.⁹

In Minnesota, it is held that the statute does not apply to proceedings to enforce the payment of taxes.¹⁰

And in Kentucky, it is held, that it has no application to proceedings brought to coerce an assessment of property for taxation, the reason in the latter case being that no cause of action arises until the assessment is made. And it may be said generally, that the statute has no application where a contract is continuing, as to a contract for the support of a person during life; the reason being that so long as the person lives the breaches of the contract will continue.¹¹

SEC. 21. For Torts, Assumpsit lies, when. — Without stopping to multiply instances, it may be said that assumpsit lies for the breach of any simple contract, and in all cases where a contract or promise exists by express act of the parties, or where the circumstances are such that the law will imply a promise; and it may be said that

¹ *Dana v. Kemble*, 17 Pick. (Mass.) 545.

² *Scott v. Warner*, 2 Lans. (N. Y.) 49; *Kingston Bank v. Ettinge*, 40 N. Y. 391; *Renard v. Fiedler*, 3 Duer (N. Y. Sup. C.), 318.

³ *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31; *Dunbar v. Johnson*, 108 Mass. 519.

⁴ *Welby v. Phinney*, 15 Mass. 116.

⁵ *Buttrick v. Allen*, 8 Mass. 273.

⁶ *Pawlet v. Sandgate*, 19 Vt. 621, unless the statute provides another remedy.

⁷ *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, id. 540, n.

⁸ *Edwards v. Nichols*, 3 Day (Conn.), 16.

⁹ *Anderson v. Akard*, 15 Lea (Tenn.), 182.

¹⁰ *Brown County v. Wynona, &c., Land Co.*, 38 Minn. 397.

¹¹ *Riddle v. Beatty* (Iowa), 41 N. W. 606.

under this head a recovery may be had for tortious acts, properly embraced under the head of actions *ex delicto*, in all those cases where from the circumstances of the case the law will imply a promise on the part of the wrong-doer to reimburse the party injured by his act. The party, under such circumstances, may elect to waive the tort and sue in assumpsit. Especially is this the case where a person has wrongfully or unlawfully obtained the goods of another and sold them,¹ or converted them to his own use, so that they cannot be returned *in statu quo*.² Thus, where a person cut and carried away growing wood of another, and converted it so that it could not be returned *in specie*, it was held that the owner might waive the tort and sue upon an implied contract of sale;³ and in all cases where the gist of the transaction is a tort, if it arises out of a contract, the plaintiff may elect whether to declare in tort or in contract;⁴ and this covers that class of actions arising from deceit,⁵ fraud,⁶ or a breach of warranty in the sale of property.⁷ In a case where a tort may be waived and assumpsit brought therefor, the latter action will lie even though an action for the tort is barred by the statute.⁸ This was well illustrated in the case last cited, in which it was held that if a tenant for life has rendered accounts for the remainder-man of timber cut by him during a period of more than six years before a bill in equity for an account of such timber, and for the value of it, the statute cannot be pleaded to the bill; and the reason assigned was, that although if the remainder-man had brought trover the tenant might, notwithstanding the rendering of the accounts, have pleaded the statute, yet he could not have done so if the remainder-man had brought assumpsit. SIR JOHN LEACH, V. C., in passing upon this question, said: "It is clear from the authorities that the plaintiff might have elected to bring an action of assumpsit, and not trover, for the money had and received by the defendant from the sale of

¹ *Bank of North America v. M'Call*, 4 Binn. (Penn.) 374; *Willet v. Willet*, 3 Watts (Penn.), 377; *Stockett v. Watkins*, 2 G. & J. (Md.) 326; *Sanders v. Hamilton*, 3 Dana (Ky.), 552; *Morrison v. Rogers*, 3 Ill. 817; *Sturtevant v. Waterbury*, 2 Hall (N. Y. Sup. Ct.), 449; *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270; *Berly v. Taylor*, 5 Hill (N. Y.), 577.

² *Goodenow v. Snyder*, 3 Iowa, 599; *Jones v. Buzzard*, Hempst. (U. S. C. C.) 240; *Fratt v. Clark*, 12 Cal. 89; *McCullough v. McCullough*, 14 Penn. St. 295; *Dundas v. Muhlenberg*, 35 id. 351; *Albrook v. Hathaway*, 3 Sneed (Tenn.), 454; *Chambers v. Lewis*, 2 Hilt. (N. Y. C. P.) 591; *Tankersley v. Childers*, 23 Ala. 781; *Patterson v. Prior*, 38 Ga. 216.

³ *Halleck v. Mixer*, 16 Cal. 574.

⁴ *Vasse v. Smith*, 6 Cranch (U. S.), 226; *Stoyle v. Westcott*, 2 Day (Conn.), 422; *Blalock v. Phillips*, 38 Ga. 216.

⁵ *Pearsall v. Chapin*, 44 Penn. St. 9; *Gray v. Griffith*, 10 Watts (Penn.), 431.

⁶ *Ascutney Bank v. McOrmsby*, 28 Vt. 721; *Leach v. Leach*, 58 N. Y. 630.

⁷ *Camp v. Pulver*, 5 Barb. (N. Y.) 41; *Roth v. Palmer*, 27 id. 652; *Evertsen v. Miles*, 6 Johns. (N. Y.) 138; *Rew v. Barber*, 3 Cow. (N. Y.) 272. But where assumpsit is brought for a breach of warranty, the plaintiff must declare specially on the contract, as it is the breach of that which constitutes the gist of the action. *Russell v. Gilmore*, 54 Ill. 147.

⁸ *Honey v. Honey*, 1 Sim. & Stu. 560.

timber, and that the rendering of the account as alleged by the bill would have been an acknowledgment by the defendant, which in the action of assumpsit would have taken the case out of the statute of limitations." In a Massachusetts case,¹ the defendant obtained possession of certain promissory notes without a legal transfer from the owner, and received payment of some of them more than six years, and of others within six years, next before action brought; and it was held that he was liable in assumpsit for the sums received within the six years, and that he was estopped to say that the notes were obtained by fraud, and so an action of trover therefor would have been barred by the statute, upon the ground that a wrong-doer cannot allege his own wrong for the purpose of antedating the injury, so as to let in the statute; and that where the injured party has a right to either of two remedies, the one he chooses is not barred by limitation because the other is. The latter rule is illustrated in the case of a note secured by mortgage upon lands. Although the note may be barred by the statute in six years, yet the mortgage being a specialty is not barred, and the mortgagee may pursue his remedy upon the mortgage at any time before the statute has run upon it, and recover the lands or the full amount of his mortgage debt. The rule may be said to be that, although statutes of limitation are equally applicable in actions at law or proceedings in equity, yet, where there are two securities for the same debt, one of which is barred and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter.² And the same rule prevails where a person is given certain personal property to hold as collateral security for the payment of a note or other obligation. The statute runs upon

¹ *Lamb v. Clark*, 5 Pick. (Mass.) 193; *Jones v. Hoar*, id. 285; *Willett v. Willett*, 3 Watts (Penn.), 277; *Ivory v. Owens*, 28 Ala. 641; *Martin v. Brooklyn*, 1 Hill (N. Y.), 545.

² *Thayer v. Mann*, 19 Pick. (Mass.) 535; *Ayres v. Wait*, 10 Cush. (Mass.) 72; *Hannon v. Hannon*, 123 Mass. 441. In the case of a claim secured by a mortgage, although the remedy by an action at law for the claim may be barred by the statute of limitations, the remedy under the mortgage will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Hanna v. Wilson*, 3 Gratt. (Va.) 242; *Coles v. Withers*, 33 id. 186; *Elkins v. Edwards*, 8 Ga. 325; *Thayer v. Mann*, 19 Pick. 535; *Pratt v. Huggins*, 29 Barb. (N. Y.) 277; *Borst v. Corey*, 15 N. Y. 505; *Belknap v.*

Gleason, 11 Conn. 160; *Miller v. Trustees of Jefferson College*, 14 Miss. 651; *Trotter v. Erwin*, 27 id. 772; *Nevitt v. Bacon*, 32 id. 212; *Joy v. Adams*, 26 Me. 330; *Wiswell v. Baxter*, 20 Wis. 713; *Cookes v. Culbertson*, 9 Nev. 199; 3 Para. on Cont. 99, 100; *Smith's Executrix v. Washington City, Virginia Midland, & Great Southern Railroad Co.*, 33 Gratt. (Va.) 84. In New Hampshire the statute expressly provides that actions upon notes secured by mortgage may be brought so long as an action upon the mortgage itself may be brought. See Appendix, New Hampshire. *Harris v. Mills*, 10 N. H. 429. In Illinois, it is held that, if the mortgage contains no covenant for the payment of money, the statute runs upon the right to foreclose it whenever the note which it is given to secure is barred.

the debt, but this does not defeat the creditor's lien upon the property given as collateral.¹ The statute simply bars the remedy, it does not extinguish the debt; consequently, where a lien is given upon property for the payment of a claim, whether by contract or by the custom and usage of trade, the lien may be enforced, although the remedy upon the debt itself is barred.² Thus, in the case last cited, the de-

¹ *Slaymaker v. Wilson*, 1 P. & W. (Penn.) 216. In *Higgins v. Scott*, 2 B. & Ad. 413, an attorney had a lien upon a judgment for a debt which was barred by the statute, and it was contended that in consequence his lien was lost; but the court held that the statute of limitations only barred the remedy and did not destroy the debt, so that the attorney had a right to be paid from the sale of the goods upon an execution issuing on the judgment, following out the principle upon which *Spears v. Hartley*, 3 Esp. 81, was predicated, that, although the statute has run upon the demand, yet if a creditor obtains possession of goods upon which he has a lien for a general balance he may hold them for that demand by virtue of his lien.

² *Spears v. Hartley*, 3 Esp. 81. All liens which are created by a deposit of personal property by one person in the hands of another, under an express or implied stipulation that the latter shall be entitled to retain it for his security until some debt due to him from the former is discharged, are in the nature of pawns or pledges, whether the deposit was made for the execution of some purpose on the goods in the course of trade or for bare custody. But the term "pawn," as generally understood, applies only where goods are deposited for the latter purpose; but in this connection we use the term as applicable to both purposes.

The distinction between a pawn and a mortgage is of great importance, and is well given by LORD HARDWICKE in *Ryall v. Rowles*, 1 Atk. 167, the substance of which is, that a mortgage is a conditional sale, by which the general legal property in the thing mortgaged is conveyed to the mortgagee, subject to the mortgagor's power of redemption. But by a pawn the pawnee acquires only a special property in the thing pawned, with the

right to detain it for his security until it is redeemed, the general property still remaining in the pawnor.

At law, although not in equity, a mortgage operates as a transfer of the property, and therefore no lien can exist, for a right of lien necessarily supposes a right of property in another; and it would be a contradiction of terms, and absurd, to say that a man had a lien upon his own property. BULLER, J., in *Lickbarrow v. Mason*, 6 East, 25, n.

In the case of pawns, a lien is created by the transaction itself, and may be claimed to any extent to which the agreement by which the pledge is effected declares it shall extend, whether it be for money previously lent, or at the time of deposit, or to be thereafter advanced. Thus, the acceptor of a bill of exchange may retain money and effects of the drawer in his hands to discharge it, either until the bill is delivered up to him or until he receives a bond of indemnity against being sued upon it. *Hammond v. Barclay*, 2 East, 227, *Madden v. Kempster*, 1 Camp. 12. But *quære*, whether if the drawer, payee, and acceptor of a bill became bankrupts after the bill is negotiated, and the payee is in possession of property of the drawer, who, in the event of the bill being proved against the estate of the payee, will be indebted to the payee, the assignee of the bankrupts under the commission against the estate of the payee will have any lien arising from the possibility of such debt. *Walker v. Birch*, 6 T. R. 208.

It often becomes a question how far a subject which is pledged for a debt already due can be considered as a security for further loans where there is no agreement to that effect, and it may be said that questions of this character must be determined largely by the circumstances of each case. If it can be presumed from these

fendant, a wharfinger, claimed a lien upon a log of mahogany for wharfage and a general balance on account. The balance claimed

that the ground and inducement upon which the pawnee advanced the further loans was his having a pledge in his hands, a court of equity will not suffer the pledge to be redeemed without payment of all the advances. *Ex parte Ockenden*, 1 Atk. 236. Thus, where a testator had borrowed a sum of money upon a pawn of jewels, and afterwards borrowed three other several sums of the pawnee, for each of which he gave his note, without taking any notice of the jewels, it was held that his executors could not redeem the jewels without first paying the money due upon the notes, because it was presumed, from the money being lent subsequent to the deposit of the pledge, that the pawnee lent the money on the credit of the pledge. *Dermainbray v. Metcalf*, 2 Vern. 291. But it must not be understood that there is any general rule, either at law or in equity, that where a person holds security for a loan already made, advances a further loan to the same person, he invariably is entitled to hold such security until both loans are repaid; because, if there is anything in the circumstances attending the transaction, or subsequently, that tends to rebut the presumption that the last loan was made on the faith of the security, he can only retain it for the payment of the first loan. *Ex parte Ockenden, ante*. Thus, where personal securities were pledged to secure a specific debt, and afterwards a mortgage was made by the pawnor to the pawnee of certain lands, and no mention was made of the debt for which the personal securities were pledged, and afterwards the same securities, together with others, were pledged to the pawnee for the balance of an account due to him from the pawnor, no notice being taken of the mortgage, redemption of the personal securities was decreed without compelling the discharge of what was due on the mortgage, because there appeared to have been no intention of tacking the securities to the mortgage at the time the latter was made, and because, if such an intention did exist, it was waived by the subsequent pledge of the securities without noticing

the mortgage, and the transactions were entirely distinct. *Jones v. Smith*, 2 Ves. Jr. 372. The decree in this case was reversed in the House of Lords (6 id. 229, note *d*), but not upon any ground impugning the doctrine stated. See also *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Adams v. Clayton*, 6 Ves. Jr. 226.

It may be said, in drawing this rather desultory note to a close, that at the common law a lien cannot be acquired in either of the following cases:—

1st. Where the deposit is made after an open act of bankruptcy by the pawnor, or with the intent to give the pawnee a fraudulent preference over other creditors in the event of his bankruptcy. *Tamplin v. Diggins*, 2 Camp. 312; *Wilson v. Balfour*, id. 579.

2d. Where the goods were pawned without the authority of the owner, even though the pawnee was ignorant of the fact. *Marsden v. Punshall*, 1 Vern. 407; *Maans v. Henderson*, 1 East, 337; *De Bauchant v. Goldsmid*, 5 Ves. Jr. 211; *Daubigny v. Duval*, 5 T. R. 604; *Strode v. Blackburn*, 3 Ves. Jr. 222.

This rule, of course, does not apply to such property or securities as are placed upon the same footing as money,—as banknotes, notes payable to bearer, bills of exchange duly indorsed, and such other securities, the legal interest in which by the law merchant passes upon delivery, and which, if passed to a *bona fide* holder for value, cannot be recovered by the original owner. *Miller v. Race*, 1 Burr. 432; *Glyn v. Baker*, 13 East, 509; *Grant v. Vaughan*, 3 Burr. 1516; *King v. Milsam*, 2 Camp. 5; *Lowndes v. Anderson*, 13 East, 130; *Solomon v. Bank of England*, id. 135, n.; *Peacock v. Rhodes*, Davy, 682; *Hill v. Simpson*, 7 Ves. Jr. 152; *Taylor v. Hawkins*, 8 id. 209; *Newson v. Thornton*, 6 East, 17; *Murlead v. Drummond*, 17 Ves. Jr. 152; *McCombe v. Davies*, 6 East, 538; *Paterson v. Tash*, 2 Strange, 1178; *Hoare v. Harstopp*, 3 Atk. 44; *Horwood v. Smith*, 2 T. R. 750; *Viner's Abr. tit. Pawn (E)*. It has been held, however,

was barred by the statute of limitations, and for that reason the plaintiff insisted that the defendant could not justify under the lien. But the court held otherwise, LORD ELDON saying: "If what is claimed by the defendant's counsel as law, that the debt is discharged by the operation of the statute of limitations, no lien could be obtained by reason of it. But the debt was not discharged; it was the remedy only. I am of the opinion that, though the statute of limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case the defendant had a subsisting demand when the goods came to his possession, and I am of opinion he may enforce it by the lien which the law has given him for his general balance."¹ In the case last cited this doctrine was extended to an attorney's lien upon a judgment, although his debt was barred by the statute. In that the attorney for the plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lord's Act. But at a subsequent period a *fiery facias* issued against his goods, upon which the sheriff levied the damages and costs, and it was held that the attorney, although he had taken no step in the cause, or to recover his bill and costs within six years, still had a lien on the judgment therefor, and the court directed the sheriff to pay him the amount out of the proceeds of the goods.² In Virginia it has been held that the statute does not run against the lien of a grantor for the purchase-money of land, although the debt itself is barred, where, at the time of sale, he gave a bond conditioned for the execution of a deed by him when the purchase-money should be paid;³ and the same rule also prevails where a lien is given by statute for a simple-contract debt. Thus, where the statute gives to a municipal corporation a lien upon land opposite to which certain improvements are made, the statute does not run upon the lien, nor is it lost until the lapse of such a period that the law will raise a presumption that the claim has been satisfied.⁴

It was intimated in an early New York case⁵ that a mortgage to

that where goods obtained by false pretences were pawned without notice of the fraud to the pawnee, that he acquired a lien thereon, so that he could maintain trover therefor against the owner who took them out of the pawnee's possession. *Parker v. Patrick*, 5 T. R. 175.

¹ See also *Higgins v. Scott*, 2 B. & Ad. 413.

² In all cases where by contract or by

operation of law a lien exists, this rule applies. *Kerrison v. Williams*, 3 Camp. 418; *Hopkins v. Cockerell*, 2 Gratt. (Va.) 88.

³ *Hopkins v. Cockerell*, 2 Gratt. (Va.) 88.

⁴ *Connect v. Moyamensing*, 2 Penn. St. 224.

⁵ *Jackson v. Sackett*, 7 Wend. (N. Y.) 74.

secure a simple-contract debt was presumed to have been paid within six years from the time when it became due, and in that event that the security was released from the lien. But this doctrine does not prevail, except when the statute provides that the lapse of the statutory period shall raise such presumption; and in that case, of course, the lien would be destroyed unless the presumption is overcome by some of the modes provided by the statute. Thus in New York, by statute,¹ it is provided that, after the expiration of twenty years after a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period; and this provision is also extended to domestic and foreign judgments, and as to these debts, but no others, this presumption is made conclusive. In North Carolina,² after the lapse of ten years after a right of action accrues, the presumption of payment is raised against all judgments, contracts, or agreements, "under the same rules, regulations, and restrictions as now exist at law in such cases;" and in the case of mortgages the period is fixed at thirteen years. "Under this statute, so far as liens are concerned, as, at common law, the presumption of payment arising from the lapse of time may be rebutted, it would seem that the presumption raised by the statute might also be. In Wisconsin,³ every judgment and decree in any court of record of the United States, or of any State or Territory thereof, is deemed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered; and in Missouri⁴ a similar provision exists as to judgments and decrees, with the exception, however, that such presumption may be repelled by proof of payment, or written acknowledgment of indebtedness made within twenty years of some part of the amount recovered

¹ Appendix, New York.

In *Bean v. Tonnele*, 94 N. Y. 381, it was held that where an action was brought against the maker, upon a promissory note more than twenty years after the same fell due, the statute of limitations was not a bar because of non-residence of the defendant, yet that the lapse of time raised a presumption of payment.

It appeared that the defendant executed the note for the accommodation of the payee, who indorsed the same to the plaintiff; that said payee was dead, but that for a period of seventeen years after the note fell due he was within the juris-

diction of the court. The defendant then offered to show that the plaintiff was in indigent circumstances during this period; this was objected to and excluded. This was held erroneous, and that the evidence was proper as tending to fortify the presumption of payment or satisfaction; and that the error was not cured, or the objection waived, by the rejection, upon the defendant's objection, of evidence offered by the plaintiff, tending to explain the delay in bringing suit.

² Appendix, North Carolina.

³ Appendix, Wisconsin.

⁴ Appendix, Missouri.

by such judgment or decree, and that in all other cases it shall be conclusive, and the same provision is extended to all sealed instruments for the payment of money; and substantially the same provision exists in Arkansas,¹ except that in the latter State the presumption is extended to any instrument for the payment of money or delivery of property after the lapse of ten years from the time when a right of action accrues thereon, and which is made conclusive, except in the instance named in the Missouri statute. In these States the rule would doubtless be, as to the class of securities named in the several statutes, that the lien was extinguished by the lapse of the statutory period; but the statute only applies to the class of claims named.

SEC. 22. Lapse of Statutory Period does not give Title to Pledgee of Property, except. — If a stipulated time is agreed upon for the payment of a debt secured by a pledge, the fact that the debt is not paid at the time does not pass the absolute title to the property to the pawnee. He may, after that time, sell the pledge if he chooses so to do, and after reimbursing himself pay the balance, if any, received therefor over to the pledgor;² but if, instead of selling the pledge, he retains it in his possession, he continues to hold it as a pledge, and the pledgor may redeem it at any time, as neither prescription nor the statute of limitations run against it.³ And if no time is fixed for its redemption, the pawnor has his whole lifetime in which to redeem, unless the pawnee quickens him through a bill in equity, or by notice *in pais*.⁴ And this

¹ Appendix, Arkansas.

² Story on Bailments, 235; Glanville, book 10, c. 6. Where there is no agreement that the pawnee shall sell, he cannot be compelled to do so. *Badlam v. Tucker*, 1 Pick. (Mass.) 389. But if he chooses to do so, he may sell without judicial process, upon giving reasonable notice to the pledgor. *Parker v. Braucker*, 22 Pick. (Mass.) 46. The sale, unless otherwise agreed, must be at public auction, with notice to the pledgor of the time and place of sale. *Washburn v. Pond*, 2 Allen (Mass.), 474. But see *Worthington v. Tormey*, 34 Md. 182, where it was held that notice of the place of sale need not be given. As to the pawnee's duty to pay the surplus over to the pawnor, although the statute has run on the debt it was given to secure, see *Hancock v. Franklin Ins. Co.*, 114 Mass. 153. But it must be understood that a right to sell only exists when the lien is created by contract. A lien that is raised by usage or the law confers no such right, *Doane v. Russell*, 3 Gray (Mass.), 382; *Briggs v. Boston, &c.*

R. R. Co., 6 Allen (Mass.), 642; unless the statute confers such right.

³ *Kemp v. Westbrook*, 1 Ves. 278; *Slaymaker v. Wilson*, 1 P. & W. (Penn.) 216; *White Mountain R. R. Co. v. Bay State Iron Co.*, 50 N. H. 57. In *Weeks v. Weeks*, 5 Ired. (N. C.) Eq. 111, it was held that a person who had received slaves from his father as a parol gift or loan could not avail himself of the statute of limitations to protect his title thereto; but in a Missouri case, *Cook v. Clippard*, 12 Mo. 379, where a slave was loaned and held five years without the owner ever having demanded the same, a purchaser from the bailee who knew the facts was held to have acquired a good title thereto.

⁴ *KENT*, J., in *Cortelyou v. Lansing*, 2 Cai. (N. Y.) 200; *Gulick v. James*, 12 Johns. (N. Y.) 146; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62. Where the pledge is secured by a mortgage, the pledgor may redeem, after foreclosure even, if the pledgor still retains the property. *White Mountain R. R. Co. v. Bay State Iron Co.*, 5 N. H. 57.

is so even though the pawnee dies, and a tender made to his executor is good, and reverts the title to the property in the pawnor.¹ In the

¹ *Ratcliff v. Davis*, Yelv. 178. In *Cortelyou v. Lansing*, *ante*, the subject is fully discussed. An abstract of the opinion of KENT, J., in that case, is of so much value upon this question, that, although not strictly germane to our topic, it will be found of great value in questions of this character.

“There is a difference,” says he, “between a mortgage of goods and a pledge or pawn. A mortgage is an absolute pledge, to become an absolute interest if not redeemed at a fixed time; and is, in certain cases, valid without delivery. The legal property passes, with a condition of a defeasance. A pledge or pawn of goods is a deposit of them as a security; and delivery is essential. The general property does not pass, as it does in case of a mortgage, but remains in the pawnor. Dig. lib. 13, tit. 7, 9; 1 Hub. 291, § 15; Bracton, 99 b; Bro. Abr. Pledges, 20; Pow. on Mortg. 3; *Jones v. Smith*, 2 Ves. Jr. 378. The mortgage and the pledge or pawn of goods have, however, generally been confounded.

“Glanville observes, lib. 10, c. 6, that a loan is sometimes made on the credit of a putting in pledge, and the pledge may consist of chattels, lands, or rents. Sometimes possession is immediately given of the pledge on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a certain period, and sometimes indefinitely. When a thing is pledged for a definite period, it is either agreed that if, at the time appointed, the debtor shall not redeem his pledge, it shall then belong to the creditor, so that he may dispose of it as his own; or no such agreement is made. In the former case, the agreement must be adhered to; in the latter, the term having expired without the debtor's discharging the debt, the creditor may complain of him, and the debtor shall be compelled to appear and answer in court, by a writ (the form of which is given in c. 7), thus, ‘Command N. that justly and without delay he redeem such a thing, which he has pledged to R. for a hundred marks, for a term which is past, as he says, and of which he complains that he has not redeemed it;

and unless he does so,’ &c. In c. 8 he says, if the debtor confess in court that he pledged the thing in question for the debt, he shall be commanded at a reasonable period to redeem his pledge; and unless he comply, liberty shall be given to the creditor from that time to treat the pledge as his own property, and do whatever he chooses with it. If a thing be pledged indefinitely, and without any period being fixed, the creditor may, at any time he chooses, demand the debt. The debt being discharged by the person owing it, the creditor is bound to restore to him the thing pledged without any deterioration. See Beames's translation of Glanville, 252 to 257, 1 Reeves Hist. 161, 163. This authority establishes two points: 1st, that if the pledge was not redeemed by the time stipulated, it did not then become absolute property in the hands of the pawnee, but he was obliged to have recourse to the *aula regis*, and to sue out an original writ in order to obtain authority to dispose of the pledge; 2d, that if the pledge was for an indefinite term, the creditor might at any time call upon the debtor to redeem, by the same process of demand. By what authority the judges in the time of James I. advanced a different doctrine on the subject is not made to appear.

“In *Ratcliff v. Davis*, *ante*, it is said that if no time is limited for redemption the pawnor has time to redeem it during his life; but if he die without redeeming, the right is gone, and his representatives cannot redeem. In Bulstrode's report of the case the only reason stated is, that it would be mischievous to compel the pawnee to keep the goods thus pawned for such an indefinite time when he has paid sufficiently for them. This objection would have been found to have no validity if the judges had attended to the law as laid down by Glanville, who says, the creditor may quicken his debtor's delay, and demand his debt at any time, by a process which he has stated. In Noy's report, as well as in the text, the reason stated is, that the pledge is a condition personal, and extends only to the person of him who pawned it. This ground of the opinion is

case last cited from Yelverton, the plaintiff pawned a diamond hat-band to one Whitlock for a loan of £25, no time being agreed upon for re-

equally unsound. A pledge is not a property created upon a condition of defeasance like a mortgage. It has no analogy to the case of a right which is absolute, to vest or to be defeated on the happening of an event; nor is it susceptible of that strict construction, unless it be so modified by the express agreement of the parties. Least of all is it a condition personal, to be performed exclusively by the pawnor. There is nothing of this in the nature of the contract; and in most cases, as when the time of payment is mentioned, it is agreed that the right may remain perfect in the representatives of the parties.

"In feoffments of land, upon condition that the feoffee do an act, and no time be limited, there he has only his lifetime; but if his heirs be mentioned, the condition is not broken by his death, but extends to his heirs indefinitely without limitation of time, and cannot be broken except upon request made by the feoffor or his heirs. Lord Cromwell's Case, 2 Co. 79; Duke of Norfolk's Case, Dyer, 139 *a*. If the naming of the heirs would, in this case, do away the limitation of this condition to the person of the feoffor, even according to the rigid construction which used to prevail under the genius of the feudal law over feoffments upon condition, surely it cannot be material that in personal contracts executors should be named; for it is a general and well-established principle that they are affected equally as if named.

"This notion of a pledge, resting on the performance of a condition to re-vest the right, as in the case of a mortgage, probably led to the decision in *Capper v. Dickinson*, 1 Rol. Rep. 315, that if goods pawned for a limited time are not redeemed at the day, they are forfeited, and may be sold at the will of the pawnee. This doctrine is also laid down in the Office of Executors. But this is contrary to the contract of pledge, is repugnant to the ancient law, and is contradicted by BARON COMYNS, who is of himself a great authority. Com. Dig. Mortgage by Pledge of Goods, B. It is also contrary to the civil law, and to the law of France, Hol-

land, and Scotland. 3 Hub. 1072, § 6; 1 Domat, 362, §§ 9, 10; 2 Ersk. 455.

"An extra-judicial dictum of LORD C. J. TREBY, 1 Ld. Raym. 434, and another of LORD HARDWICKE, 1 Ves. 278, and both supported only by *Ratcliff v. Davis*, *ante*, which go to show that the pawn is not redeemable after the pawnee's death, are the only remaining authorities on which the proposition has rested."

In *Tucker v. Wilson*, 1 P. W. 261, and *Lockwood v. Ewer*, 2 Atk. 303, and *Kemp v. Westbrook*, 1 Ves. 278, it was said that a pawnee of stock was not bound to bring a bill of foreclosure, and might sell without it. But in the first two cases the stock had been, in the first instance, absolutely transferred to the mortgagee, with a defeasance thereto that the assignment should be void or the stock retransferred on payment at the day. They were cases, therefore, not of a pledge, but of a mortgage of goods; and though it is nowhere stated in what manner the mortgagee is to sell, yet in the first of these cases there was a previous notice to the opposite party according to the rule of the civil law, and the giving of this notice was asserted to be the constant practice. The last case was strictly a pledge of chattels to secure a loan without a specified time of payment; and the assignee of the pawnor, who had become a bankrupt, was allowed to redeem. *Demandray v. Metcalfe*, Prec. Ch. 420; 2 Vern. 691, 698; Gilb. Eq. Rep. 104; 1 Eq. Cas. Abr. 324, s. c.; and *Vanderzee v. Willis*, 3 Bro. C. C. 21, are cases of pledge, and perfectly in point. In the one case there was a pawn of jewels, and in the other of bonds and securities. In both cases the time of payment had elapsed in the lifetime of the pawnor; but the executors, on a bill to redeem on payment of the debt and interest, obtained a decree accordingly. It is said, indeed, in the first case, that the executors could not have back the jewels without the assistance of chancery. If by this was meant the identical chattel pawned, it was perhaps correct; but if the observation meant that executors had no remedy but in equity, it must be a mistake; for a court

demption. Whitlock's wife, with her husband's assent, delivered the hat-band to the defendant. Whitlock died, and after his death the plaintiff tendered the £25 to his wife, who was executrix, who refused to receive it, and also demanded the hat-band of the defendant, who refused to deliver it to him. In trover therefor the court held that the tender was well made to the pawnee's executrix, and that a recovery might be had of the defendant, for the reason that, where no time for redemption is agreed upon, the pawnor has his whole lifetime in which to redeem. While, as stated, the statute of limitations does not give the pawnee the absolute property in the pledge during the life of the pawnor, so long as it is unsold and he retains it in his possession, yet after a long lapse of time, if no claim for redemption is made, the right will be deemed to be extinguished, and a court of equity will decline to entertain a bill for its redemption.¹

SEC. 23. Clauses in the Several Statutes that cover Simple Contracts. — In this country, in most of the States, the action of assumpsit

of law has complete jurisdiction over the subject, and is equally competent to grant relief where the right of property is not extinguished. It would be unreasonable to turn the plaintiff round to another forum when there are no technical difficulties to impede, nor any defect of authority to give him redress at law by restoring to him, if not the specific thing, yet its equivalent. If a court of law will permit one party to demand his debt after the time, it will equally permit the other party to tender and redeem. In the *South Sea Company v. Duncomb*, 2 Stra. 919, it was decided that where the pawnor of stock did not pay at the day stipulated, the pawnee had his election to sue for the debt, or to stand to his remedy against the pawn. The court did not state the remedy; but still there was to be a remedy under the sanction of law; and the only remedies hitherto suggested in the books are the process by writ as stated in Glanville — the bill of foreclosure, as hinted in other cases — and the sale by the pawnee, after notice, in cases of the transfer of stock, as seems to have been the practice.

From this review of the cases it follows that whatever right to redeem exists in the pawnor at his death, that right descends entire and unimpaired to his representative. The expression in the text, that the pawnee has his life as a time to redeem when no time of redemption is fixed, must be taken with this qualification, that the pawnee does not, in the mean time, call

upon him to redeem. A sale without such call and notice was, in the case of *Cortelyou v. Lansing*, *ante*, held to be a conversion. A similar decision has been made in Pennsylvania. *De Lisle v. Priestman*, 1 Browne (Penn.), 176. Except in cases of special agreement, the Roman law never allowed a pledge to be sold by the creditor, but upon notice to the debtor, and the allowance of a year's redemption. 1 Hub. 157, §§ 2, 3; *id.* 172, § 6; *Perezius on the Code*, vol. ii. tit. 34, §§ 4, 5. And as this was not sufficiently observed, Justinian regulated the method of foreclosure by a particular ordinance, by which two years' notice, or two years after a judicial sentence, was allowed to the debtor. The creditor may sue for his debt and proceed in the same manner as he might if no pledge had been given; but on payment of the debt he must restore the pledge. Glanville, lib. 10, c. 6, 12; *Anon.*, 12 Mod. 564; *Vin. Abr.* tit. Pawns. A contrary doctrine was held in *Ceverly v. Brackett*, 8 Mass. 450. But the doctrine of that case has been overruled and the doctrine last stated adopted. *Taylor v. Cheever*, 6 Gray (Mass.), 146; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Beckwith v. Sibley*, 11 id. 482; *Whitwell v. Brigham*, 19 id. 117.

¹ Story on Bailments, 235; Powell on Mortgages. *Coytingham's App.*, 57 Penn. St. 498; *Davis v. Frink*, 40 id. 493; *Sitgreaves v. Bank*, 49 id. 359; *Dillon v. Brubaka*, 57 id. 498.

is expressly brought within the statute, while in others the matter is left to inference, as in the statute of James. Thus, in Maine, the clause covering this class of actions is "all actions of assumpsit or upon the case, founded upon any contract or liability, expressed or implied;"¹ in Vermont, "all actions of account, assumpsit, or on the case, founded upon any contract or liability, expressed or implied;"² in New Hampshire,³ "all other personal actions shall be brought within six years after the cause of action accrued, and not after." This covers all personal actions except actions for words, assault, battery, wounding, or imprisonment, which must be brought within two years. In Massachusetts,⁴ "actions of contract founded," &c. In Connecticut,⁵ "no action of account, book debt, debt on simple contract, or of assumpsit, founded upon implied contract, or upon any contract in writing not under seal, except promissory notes not negotiable, shall be brought but within six years next after the right of action shall accrue." In Rhode Island⁶ the statute is substantially the same as 21 James I. In New York,⁷ "an action upon a contract, obligation, or liability, express or implied, except a judgment or sealed instrument," is barred in six years, while an action upon a sealed instrument is only barred in twenty years. The action of assumpsit, as a distinctive action, does not exist under the code, but the rules applicable thereto apply to actions upon the class of contracts for which the action formerly lay. In New Jersey,⁸ the statute relating to this matter is the same in substance as the statute 21 James I. c. 16, § 3; and such also is the case in Pennsylvania.⁹ In Delaware, "no action of debt not founded upon a record or specialty, no action of account, no action of assumpsit, and no action upon the case whatever, shall be brought after the expiration of three years from the accruing of the cause of such action."¹⁰ In Maryland,¹¹ "all actions of account, assumpsit, or upon the case," are required to be brought within three years after the cause of such action arose. In Virginia,¹² provision is made for actions upon contracts, written or unwritten, and they are barred in five years, except where the action is for goods charged in any store account, in which case the statute runs in two years. In North Carolina,¹³ actions upon contracts are barred in three years; and this embraces actions of assumpsit, as do all the statutes which make provision for the limitation of actions upon contracts, without specifying the particular form of action, as the word "assumpsit" includes all actions upon promises, express or implied, and the word "contract,"

¹ Appendix, Maine.

² Appendix, Vermont.

³ Appendix, New Hampshire.

⁴ Appendix, Massachusetts.

⁵ Appendix, Connecticut.

⁶ Appendix, Rhode Island.

⁷ Appendix, New York.

⁸ Appendix, New Jersey.

⁹ Appendix, Pennsylvania.

¹⁰ Appendix, Delaware.

¹¹ Appendix, Maryland.

¹² Appendix, Virginia.

¹³ Appendix, North Carolina.

as used in the statutes, embraces the action of assumpsit. In South Carolina in six years;¹ and in Georgia,² all simple contracts are barred in six years. In Alabama,³ Mississippi,⁴ Tennessee,⁵ and Kentucky,⁶ actions upon contracts are provided for. In Ohio,⁷ "actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract, or promise in writing, are barred in fifteen years;" and actions upon contracts not in writing, express or implied, within six years. And in the latter State the words "action upon the case" have been held to include assumpsit in all its forms;⁸ but the language of the statute is now broad enough, so that it can be said to expressly include this form of action. In Indiana,⁹ the statute expressly applies to contracts in writing, and unwritten contracts, fixing different periods of limitation for each. Such also is the case in Illinois.¹⁰ In Michigan,¹¹ this portion of the statute is the same as in Maine. In Wisconsin,¹² "an action upon any . . . contract for the payment of money," also "upon any other contract, express or implied," must be brought in six years; and, except that a distinction is made between contracts in writing and those not in writing, such is practically the provision in Missouri¹³ and in Arkansas.¹⁴ In Florida,¹⁵ "an action upon any contract, whether sealed or unsealed, for the payment of money," must be brought in ten years; and "all actions upon contracts . . . express or implied," not in writing, in five years. In Texas,¹⁶ "actions for debt, when the indebtedness is evidenced by or founded upon any contract in writing," are barred in four years; and by sec. 3207 the same limitation applies to unwritten contracts. In Iowa,¹⁷ actions "founded on unwritten contracts" must be commenced within five years, and upon "written contracts" within ten years, after the cause of action accrues; in California,¹⁸ "upon any contract, obligation, or liability founded upon an instrument in writing," within four years, and upon those not in writing, in two years. In Oregon,¹⁹ actions upon "a contract or liability, express or implied," are barred in six years; and actions upon a judgment or decree of any court of the United States, or of any State or Territory within the United States, and upon sealed instruments, are barred in ten years. By sec. 6, actions upon any liability created by statute, except for penalties and forfeitures, are barred in six years; and by sec. 11 all actions not specified are barred in ten years. In Minne-

¹ Appendix, South Carolina.

² Appendix, Georgia.

³ Appendix, Alabama.

⁴ Appendix, Mississippi.

⁵ Appendix, Tennessee.

⁶ Appendix, Kentucky.

⁷ Appendix, Ohio.

⁸ *Williams v. Williams*, 5 Ohio, 444.

⁹ Appendix, Indiana.

¹⁰ Appendix, Illinois.

¹¹ Appendix, Michigan.

¹² Appendix, Wisconsin.

¹³ Appendix, Missouri.

¹⁴ Appendix, Arkansas.

¹⁵ Appendix, Florida.

¹⁶ Appendix, Texas.

¹⁷ Appendix, Iowa.

¹⁸ Appendix, California.

¹⁹ Appendix, Oregon.

sota, "an action upon a contract, express or implied;"¹ in Kansas,² "an action upon any agreement, contract, or promise in writing," or "an action upon any contract not in writing, express or implied," must be commenced within five years in the former State and in three years in the latter. In Nevada,³ "an action upon any contract, obligation, or liability founded upon an instrument in writing," must be commenced within five years, and "an action upon a contract, obligation, or liability not founded upon an instrument in writing," within two years; in Nebraska,⁴ "upon any agreement, contract, or promise in writing, five years," and "an action upon a contract not in writing, expressed and implied," within four years.

A summary of the statutes in the several States relating to this matter has been given, in order that it may be seen how far the decisions of the courts of one State are applicable under this head in another, and also to show the applicability of the decisions of the English courts under sec. 3 of the statute 21 James I. upon this head, which is practically in force in all the States.

SEC. 24. Account. Nature of Action. — The action of account is probably one of the oldest of the common-law actions, and is resorted to to settle partnership accounts, and generally where there is a priority, as against guardians in socage, or a person stands in the relation of a bailiff or receiver, and it really bears a closer relation to a bill in equity than to an action at law.⁵ Anciently, this form of action was restricted, but gradually it was extended to cases of mutual account between merchants, and lay in all cases where a person calling himself a merchant brought an action against another, charging him as a bailiff or receiver.⁶ At law, it is the only remedy between partners to settle their partnership dealings, unless, as previously stated, there has been an express promise to account, or a balance agreed upon.⁷

¹ Appendix, Minnesota.

² Appendix, Kansas.

³ Appendix, Nevada.

⁴ Appendix, Nebraska.

⁵ *Cotton v. Partridge*, 4 M. & G. 285; *Scott v. McIntosh*, 2 Camp. 238; *Inglis v. Hay*, 8 M. & W. 769.

The complaint in this action set up a co-partnership agreement between the parties under seal, bearing date April 22, 1869, which contained a covenant "that all losses happening to said firm . . . and all expenses of the business shall be borne by said parties in equal proportion." The complaint then alleged in substance the expiration of the partnership agreement; an application of all its property and assets to the payment of its debts; that the business had resulted in large losses,

which had been paid by the plaintiff, and that the defendant had failed to pay his one-half of the losses and expenses. An accounting and payment of said one-half was demanded. The defendant pleaded the statute of limitations. Held, that the action was upon a sealed instrument within the meaning of said statute; not an equitable action for contribution merely; and so that the twenty years' limitation applied. *Dwinell v. Edey*, 102, N. Y. 423.

Peters v. Delaplaine, 49 N. Y. 362, distinguished.

⁶ F. N. B. 117, D; 1 Story's Eq. Jur. 441; *Cotton v. Partridge*, *ante*.

⁷ *Andrew v. Allen*, 9 S. & R. (Penn.) 241; *Ozias v. Johnson*, 1 Binn. (Penn.), 191; *Young v. McCormick*, 2 N. J. L. 663; *Willson v. Willson*, 5 id. 791.

This remedy exists where parties have been engaged in a joint undertaking, and either one or all of them have received money or property which should be accounted for to the others¹ as tenants in common of real property,² or of personal property, as merchandise.³ The exception in the statute 21 James I., as to merchants' accounts, was confined to cases where an action of account would lie, or an action upon the case for not accounting.⁴ This action, as a distinctive remedy, has fallen into disuse, and although it still exists in some of the States, yet it has been largely superseded by a resort to courts of equity, where the rights of the parties can be better settled and enforced than in courts of law, and, too, where the remedy has been extended to a great variety of cases not recognized as coming within the scope of the remedy at law.⁵ Formerly it was doubted whether assumpsit would lie upon an express promise to account, or upon a balance struck between partners, &c.; but as that doubt was long since dispelled, assumpsit has also, in a large variety of instances, taken the place of this form of action,⁶ except, however, where there is an express promise to account, or a balance agreed upon, on a settlement of partnership accounts, assumpsit will not lie, but resort must be had to an action of account, or to a court of equity.⁷ Thus, where a balance was struck in favor of

¹ *Nedvidek v. Meyer*, 46 Mo. 600; *Kidder v. Rexford*, 16 Vt. 169; *Mattocks v. Lyman*, id. 113; *Swift v. Raymond*, 11 id. 317.

² *Thomas v. Thomas*, 5 Exch. 28; *Barnum v. Landon*, 25 Conn. 137; *Lacon v. Davenport*, 16 id. 331; *Oviatt v. Sage*, 7 id. 95; *Dresser v. Dresser*, 40 Barb. (N. Y.) 301; *Wiswell v. Wilkins*, 4 Vt. 137. But in such cases it is necessary to allege that the tenant made defendant has received more than his share of the rents or profits of the estate. *Sturton v. Richardson*, 13 M. & W. 17; *Henderson v. Eason*, 17 Q. B. 701; *Beer v. Beer*, 12 C. B. 60. And in New York it should state that the account is mercantile, *McMurray v. Rawson*, 3 Hill (N. Y.), 59; and should also set forth distinctly all the grounds upon which the plaintiff claims to hold the defendant to an accounting, *Ganaway v. Miller*, 15 Vt. 162; and the plaintiff's particular interest in the property, *Brinsmaid v. Mayo*, 9 id. 31; and it should also appear that before action brought the plaintiff had demanded of the defendant that he render an account, *Chadwick v. Duval*, 12 id. 499; and an account cannot be enforced until the joint venture is ended, either by agreement, or limitation, *Ganaway v. Mil-*

ler, ante. In Maine, under the statute, it is held that actions of account between co-tenants, or a bill in equity therefor, are not subject to the six years' limitation, but to that of twenty years, under sec. 86. *Spaulding v. Farwell*, 70 Me. 17.

³ *Baxter v. Hozier*, 5 Bing. N. C. 288.

⁴ *Cottam v. Partridge*, 4 M. & G. 271. And it was held in this case that an open account between two tradesmen for goods sold each to the other, without any agreement that the goods delivered on the one side should be considered as payment for those delivered on the other, did not constitute such an account as concerns the trade of merchandise between merchant and merchant within the exception of the statute, and that the existence of items in an open account within six years will not operate to take the previous portion of the account out of the statute.

⁵ 1 Story's Eq. Juris. 442; Bacon's Abr; tit. Accompt; *Lockey v. Lockey*, Prec. Ch. 518.

⁶ 1 Story's Eq. Juris. 442; *Tomkins v. Wiltshire*, 5 Taunt. 431; *Buell v. Cole*, 54 Barb. (N. Y.) 353; *Succession of Dalhande*, 21 La. An. 3.

⁷ *Buell v. Cole, ante*; *Ferguson v. Wright*, 61 Penn. St. 258.

one partner, on the books of the firm, after his death, and similar balances were struck in favor of other partners, it was held that this was only evidence how the deceased partner stood with the firm, and not how he stood with his partners.¹ In Massachusetts, assumpsit is substituted for account; and in cases where partnership accounts are involved, the court can appoint an auditor to take the accounts, giving to the parties all the advantages, without the disadvantages, of the action of account.² This form of action has been extended in some of the States, so as to embrace other matters than accounts between partners, and to compel an accounting in all instances where a person can properly be charged as bailiff and receiver of the plaintiff.³ But while this remedy cannot be said to be obsolete,⁴ yet, as equity has concurrent jurisdiction with courts of law for the settlement of partnership transactions, and most, at least, of the matters for which the common-law action of account lies, and as courts of equity have more ample powers than courts of law in this respect, the remedy at law will seldom be resorted to, except in those States where by statute express provision is made therefor.⁵ There are instances, however, where the remedy at law must be pursued, and equity will not entertain a bill to settle matters involved in this action;⁶ but it will hardly be profitable to go into details in reference to the matter in this work, as the practitioner will find no difficulty in ascertaining which court to invoke in a given case.

SEC. 25. Debt. — An action of debt, where “grounded upon any lending or contract without specialty,” is expressly within the statute of 21 James I. § 3; and in most of the statutes in this country, even where this section is not adopted, the distinction between simple contracts and

¹ *Ferguson v. Wright*, *ante*; *Wetmore v. Woodbridge*, Kirby (Conn.), 164.

² *Fanning v. Chadwick*, 3 Pick. (Mass.) 424. But account may be brought if the party elects to do so. *Fowle v. Kirkland*, 18 Pick. (Mass.) 299.

³ *Adams v. Corbin*, 3 Vt. 372; *Smith v. Woods*, *id.* 485; *Swift v. Raymond*, 11 *id.* 317; *Bertine v. Varian*, 1 Edw. Ch. (N. Y.) 343; *Green v. Johnson*, 3 G. & J. (Md.) 388. In the last-named case it was held that account render is the only remedy that can be brought against a guardian as such, except on his bond. In *Griggs v. Dodge*, 2 Day (Conn.), 28, it was held a proper remedy where personal property is limited over by way of remainder, after the determination of the particular estate. In *Adams v. Corbin*, 3 Vt. 372, it was held a proper remedy by a surviving administrator against the representative of a deceased

co-administrator for property of the estate which came to the hands of the latter. So it is a proper remedy by a *cestui que trust* against a trustee of lands who has received the profits. *Dennison v. Goehring*, 7 Penn. St. 175.

⁴ *Griffith v. Willing*, 3 Binn. (Penn.) 307; *Travers v. Dyer*, 16 Blatchf. (U. S. C. C.) 178; *Stewart v. Kerr*, 1 Morr. (Iowa) 240; *Neal v. Keel*, 4 T. B. Mon. (Ky.) 162.

⁵ *Tyler v. Nelson*, 14 Gratt. (Va.) 214; *Fraser v. Phelps*, 4 Sandf. (N. Y.) 682; *Andrews v. Murphy*, 12 Ga. 481; *Browne v. Alston*, 8 Fla. 307; *Norwich, &c. R. R. Co. v. Storey*, 17 Conn. 364; *Gloninger v. Hazard*, 42 Penn. St. 389.

⁶ *Walker v. Cheever*, 35 N. H. 339; *Garland v. Hull*, 21 Miss. 76; *Cummins v. White*, 5 Blackf. (Ind.) 356; *Printup v. Mitchell*, 17 Ga. 558.

specialties is observed, and this action, even though not preserved in form, exists in substance, and is generally provided for in the limitation acts, either expressly or otherwise.¹ Debt lies, in all instances, where a sum certain is due, or which is capable of being reduced to a certainty without any future valuation to ascertain or settle its amount, and to that extent will lie to recover upon simple contracts as well as assumpsit.² It lies

¹ In Maine, "all actions of debt founded upon any contract not under seal." In Vermont, "all actions of debt founded upon any contract, obligation, or liability not under seal." In New Hampshire, all personal actions, except for words, assault and battery, and imprisonment, shall be brought in six years, and this includes debt, except debt "founded upon any judgment or recognizance, or upon any contract under seal," which may be brought within twenty years. In Alabama, all actions upon judgments, sec. 3224, and actions founded upon any contract or writing under seal, sec. 3225; actions upon contracts, in writing, not under seal, sec. 3226. In Massachusetts, this form of action is abolished by statute, and an action upon the contract or obligation freed from the technicalities of this form of action is substituted. In Connecticut, no action "of debt on book or simple contract." In Rhode Island, the provision is virtually the same as 21 James I., except the words "lending or" are omitted. In New Jersey, substantially the same as 21 James I.; so in Pennsylvania. In Delaware, by sec. 6, actions of debt are barred in three years. In Maryland, this action is expressly provided for in sec. 1. of art. 69 of the code. In Virginia, this action is embraced under sec. 8, c. 146. In North Carolina, this action is mainly covered by secs. 31 and 34. In South Carolina, this action is covered by secs. 113 and 114, c. 122, Rev. Stat. of South Carolina. In Mississippi, this action comes under general clause, sec. 2669 Rev. Code, p. 720. In Tennessee, this action is covered by sec. 2775. In Kentucky, this class of actions is included under secs. 1 and 2 of art. 3, Gen. Stat. c. 71. In Ohio, an action "upon a contract not in writing," in six years, and upon a specialty or any agreement, contract, or promise in writing, in fifteen years. In Indiana, actions on accounts and contracts not in writing in six years, and upon those in writing in

twenty years. In Illinois, special provision as to actions on contracts exists. In Michigan, "all actions of debt founded upon any contract or liability not under seal," six years. In Wisconsin, "an action upon any bond, &c., or other contract, whether sealed or otherwise," six years; upon a sealed instrument, "when the cause of action accrued in this State," ten years. In Missouri, "an action founded upon any writing, sealed or unsealed," ten years. In Arkansas, this action comes under the general clause, and not being specified, is barred in five years. In Florida, this class of actions come under secs. 10 and 12, c. 144. In Texas, the limitation of actions of debt upon written contracts is four years, and upon contracts not in writing in two years. In Iowa, this action is not named, but comes under divs. 3 and 4 of sec. 1659 of the code, making the bar to the action on unwritten contracts five years, and on written contracts, judgments, &c., ten years. In California, the action is not named, but comes within the provisions of the statute, and the period of limitation varies from one to five years, according to the nature of the claim on which it is founded. In Oregon, this action comes under the provisions of sec. 6. In Minnesota, the limitations imposed are contained in sec. 6. In Nevada, sec. 16 applies to this form of action. In Nebraska, secs. 10, 11, and 15 apply to this form of action. In West Virginia, this class of actions is embraced under sec. 6, c. 119. This form of action, however, is retained in but very few of the States, and especially is this the case where the practice is established under codes, the old common-law remedies, with all their technicalities and strictness, having given place to simpler remedies, which are supposed to be better calculated to protect the rights of parties and insure justice.

² In *Stockwell v. United States*, 13 Wall. (U. S.) 531, it was held that it

for the recovery of a sum certain, although it arises from a collateral undertaking;¹ as where a penalty is given by statute, and no other remedy is provided for its recovery,² although the amount thereof is uncertain and subject to assessment by a jury.³ It lies for the recovery of a reward offered for the finding of lost or stolen goods, or for any purpose,⁴ upon the judgment of an inferior court not of record,⁵ upon an express contract in writing for the payment of money,⁶ as by the payee or indorsee of a bill of exchange against the acceptor,⁷ or by the indorsee against a remote indorser,⁸ by the assignee against the assignor of a note where the maker is insolvent,⁹ to recover money advanced upon a special contract which has been rescinded,¹⁰ or where the price for goods has been paid but they are not delivered,¹¹ or upon an open account for goods sold and delivered,¹² for services rendered under a contract fully performed, or even when not fully performed in all respects, if the departure from its terms is assented to by the parties;¹³ and without pursuing this matter further, it may be said that debt upon a simple contract will lie in all instances where *indebitatus assumpsit* will lie, to wit, where an express contract, not under seal, has been performed upon the part of the plaintiff, according to its terms, so that nothing remains to be done to satisfy it but for the defendant to pay money in compensation.¹⁴ Indeed, originally debt was the ordinary

would lie to recover a penalty under the revenue laws. *United States v. Colt*, Pet. (U. S. C. C.) 145; *Dillingham v. Skim*, Hemp. (U. S. C. C.) 181; *Bank of Circleville v. Iglehart*, 6 McLean (U. S.), 568.

¹ *Home v. Semple*, 3 McLean (U. S. C. C.), 150; *Cato v. Gill*, 1 N. J. L. 11. But it does not lie upon a collateral promise to pay the debt of another. *Gregory v. Thomson*, 31 N. J. L. 166.

² *United States v. Bougher*, 6 McLean (U. S. C. C.), 1277.

³ *United States v. Colt*, *ante*.

⁴ *Furman v. Parke*, 21 N. J. L. 310.

⁵ *Tindall v. Carson*, 16 N. J. L. 94; *Green v. Fry*, 1 Cr. (U. S. C. C.) 137.

⁶ *Kirk v. Hartman*, 63 Penn. St. 97.

⁷ *Home v. Semple*, *ante*; *Kirkman v. Hamilton*, 6 Pet. (U. S.) 20.

⁸ *Home v. Semple*, *ante*. But this proposition is doubted. *Weiss v. Munch Chunk Ins. Co.*, 58 Penn. St. 295.

⁹ *Pyle v. Monagly*, 2 Harr. (Del.) 468.

¹⁰ *Jenkins v. Thompson*, 20 N. H. 457.

¹¹ *Dubois v. Delaware*, 4 Wend. (N. Y.) 285; *Byers v. Bostwick*, 2 Treadw. (S. C.) Const. 7; *Kimball v. Cunningham*, 4 Mass. 504.

¹² *Collins v. Johnson*, Hemp. (U. S. C. C.) 279.

¹³ *Allen v. McNew*, 8 Humph. (Tenn.) 46; *Clark v. Raap*, 15 Ark. 172; *Ladue v. Seymour*, 24 Wend. (N. Y.) 60.

¹⁴ *Perkins v. Hart*, 11 Wheat. (U. S.) 237; *Dukes v. Leowie*, 13 Ala. 457; *Wright v. Morris*, 15 Ark. 444; *Bayard v. McLane*, 3 Harr. (Del.) 139; *Hancock v. Ross*, 18 Ga. 364; *Adlard v. Muldoon*, 45 Ill. 193; *Ridgeley v. Crandall*, 4 Md. 435; *Fowler v. Austin*, 2 Miss. 156; *Bomeiser v. Dobson*, 5 Whart. (Penn.) 398; *Mattocks v. Lyman*, 16 Vt. 113; *Harris v. Ligget*, 1 W. & S. (Penn.) 301; *Hunter v. Waldron*, 7 Ala. 753; *Baker v. Corey*, 19 Pick. (Mass.) 496; *Ames v. Le Rue*, 2 McLean, (U. S. C. C.) 216; *Glover v. Collins*, 18 N. J. L. 232; *Bertrand v. Byrd*, 5 Ark. 651; *Brown v. Ralston*, 9 Leigh (Va.), 532; *Carson v. Allen*, 6 Dana (Ky.), 395; *Cooper v. Bickford*, 3 Grant (Penn.) Cas. 69; *Hale v. Handy*, 26 N. H. (6 Fost.) 206; *Ingram v. Ashmore*, 12 Mo. 574; *Sykes v. Summerel*, 2 Browne (Penn.), 227; *Kelly v. Foster*, 2 Binn. (Penn.) 4; *Jewell v. Schroepel*, 4 Cow. (N. Y.) 564; *Causten v. Burke*, 2 H. & G. (Md.) 295; *Miles v. Moody*, 3 S. & R. (Penn.) 211; *Snyder v. Castor*, 4 Yeates (Penn.), 353; *Cochran v. Tatum*, 3 T. B. Mon. (Ky.) 405; *Feeter v. Heath*, 12 Wend. (N. Y.) 477; *Williams*

remedy upon simple contracts,¹ and the action of assumpsit did not come into general use until after Slade's Case, in 1603.² Debt lies upon a specialty in many cases, but in those instances the statute applicable to simple contracts does not apply,³ but when founded on contracts not under seal the statute does apply.⁴ In Massachusetts the action of debt has been abolished by statute;⁵ and in many others it does not exist in form, although the rules applicable thereto may apply in cases where, under the common-law practice, it would be the proper remedy. Especially is this the case in those States where the practice is regulated by codes.

SEC. 26. **Covenant** is an action upon a sealed instrument or specialty, and never lies upon a simple contract. Upon sealed instruments a party frequently has his choice of remedies, between debt and covenant, although in very many instances, especially where the action is for unliquidated damages, covenant alone will lie.⁶ If an instrument under seal is varied by a contract not under seal indorsed thereon, the whole instrument becomes a simple contract, and assumpsit is the proper remedy, and covenant will not lie thereon, and the statute begins to run thereon from the date of the indorsement.⁷ Without stopping to particularize, the action of covenant may be said to be the only remedy strictly confined to specialty debts.

SEC. 27. **Suits in Admiralty.** — In England it was formerly doubted whether a suit in admiralty for mariner's wages was within the Stat. 21 James I., it being said that it was a matter properly determinable at common law, and that allowing the admiralty jurisdiction therein was only a matter of indulgence;⁸ but whatever doubt may there have existed upon this subject was put at rest by 4 & 5 Ann. c. 16, which provides that "all suits and actions in the court of admiralty for sea-

v. Sherman, 7 id. 109; *Way v. Wakefield*, 7 Vt. 228; *Felton v. Dickinson*, 10 Mass. 287; *Bank of Columbia v. Patterson*, 7 Cr. (U. S.) 299; *Coursey v. Covington*, 5 H. & J. (Md.) 45; *Dubois v. Delaware, &c. Canal Co.*, 4 Wend. (N. Y.) 285; *Wood v. Gee*, 3 McCord (S. C.), 421; *Stout v. Gallagher*, 2 A. K. Mar. (Ky.) 160; *Speake v. Shepard*, 6 Har. & J. (Md.) 81; *Bagley v. Bates*, Wright (Ohio), 705.

¹ *Wilkinson on Limitations*, 12; 3 *Blackstone*, 341.

² *Slade's Case*, 4 *Coke*, 91.

³ *Cockram v. Welby*, 2 *Mod.* 212; *White v. Parkin*, 12 *East*, 578.

⁴ *Cockram v. Welby*, *ante*.

⁵ *Gen. Stat.* c. 129, § 1.

⁶ *Browne's Actions at Law*, 353; *Comyns's Dig. Pleader*.

⁷ *Hydeville Co. v. Eagle R. R. & S. Co.*

44 *Vt.* 395; *Head v. Wadham*, 1 *East*, 619; *King v. Beeston*, 3 *T. R.* 592. In a Massachusetts case, *Loring v. Whittemore*, 13 *Gray (Mass.)*, 228, where an agreement to vary a sealed instrument was indorsed thereon, and not sealed, and subsequently a sealed agreement to extend the time was indorsed thereon, it was held that the last agreement under seal acted upon and gave the force of a specialty to the last unsealed agreement, and brought the whole under the head of a specialty. See also to the same effect in a similar case, *Ake's Appeal*, 74 *Penn. St.* 116. In Georgia, in *Milledge v. Gardner*, 29 *Ga.* 700, it was held that an unsealed agreement indorsed on a sealed instrument is to be treated as a part of the original instrument and as though under seal.

⁸ *Bacon's Abr. Lim.* (D) 4.

men's wages shall be commenced within six years after the cause of such action shall occur and not after." But in this country it is held that State acts of limitations do not apply to such actions in our court of admiralty,¹ nor does the statute of Anne above referred to.² But courts of admiralty will not entertain stale demands, and twelve years' delay unexplained was held sufficient to bar such a suit.³

SEC. 28. **Crimes.** — At the common law there is no limitation to criminal procedure by indictment. This question was raised in an English case, where a person who had taken a bribe at an election was called upon to testify to the fact. By the Stat. 2 Geo. II. c. 24, a civil action therefor was barred in two years, and this period had elapsed; but LORD ELLENBOROUGH cautioned him that although a civil action against him for the crime was barred, yet there was no limitation at common law to a criminal prosecution by indictment, and, therefore, that he was not bound to answer any question which might criminate him.⁴

¹ Willard v. Dorr, 3 Mas. (U. S. C. C.) 91; Brown v. Jones, 2 Gall. (U. S. C. C.) 477; The Mary, 1 Paine (U. S. C. C.), 180.

² Willard v. Dorr, *ante*; The Mary, *ante*.

³ Willard v. Dorr, *ante*; Gay v. Allen, 2 W. & M. (U. S. C. C.) 303; The Sarah Ann, 2 Sum. (U. S. C. C.) 286; Pitman v. Hooper, 3 id. 286.

⁴ Dover v. Maestaer, 5 Esp. 92.

CHAPTER III.

SPECIALTIES.

- SEC. 29. What are.
 30. Judgments.
 31. Statutory Provisions as to.
 32. Rent, Actions for.
 33. Avowry for Rent.
 34. Foreign Judgments.
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- SEC. 37. Special Statutory Provisions relating to Specialties.
 38. When Concurrent Remedy is given by Statute.
 39. Test as to whether Specialty or not.
 40. Actions for Distributive Share of Estate.

SEC. 29. **What are.**—All instruments under seal, of record, and liabilities imposed by statute, are specialties, within the meaning of the Stat. 21 James I., “without specialty.” It becomes important to know what classes of obligations come under this head, because under the Stat. 21 James I. specialties are not embraced, and to a great extent such also is the case in the statutes of the several States of this country. In England, by Stat. 3 & 4 Wm. IV. c. 42, all specialties are barred in twenty years; and even though the statute is not pleaded, it is said that the law raises a presumption of payment from the lapse of that period of time, and other circumstances which is equally as effective as a bar as the statute;¹ and in some of the States, as will be seen by

¹ Best on Presumptions, 188. In *Fisher v. Prosser*, 1 Camp. 217, it was held that, after the lapse of a long time, in this case thirty-six years, a claim not within the statute, as in that case the uninterrupted possession by one tenant in common without any demand made for or any accounting, would warrant a jury in presuming a demand. See also *Mayor v. Horner*, 1 Camp. 102, where it was held that from the lapse of a long time a grant might be presumed from the crown. See also *Eldridge v. Knott*, id. 214, where it was held that mere length of time short of the period fixed by the statute of limitations, and unaccompanied by any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit-rent. In 1 Burr. 434, a case is cited by the court where payment of a bond was pre-

sumed within eighteen years; but in that case, as in *Carter v. Straphan*, 1 Cowp. 201, the presumption was founded upon the circumstances, and not on lapse of time alone. LORD MANSFIELD, in *Eldridge v. Knott*, *ante*, says, “The statute of limitations is a positive bar from length of time, and operates so conclusively that, although the jury and the court are satisfied that the claim set up subsists, yet they are bound by the statute to defeat the claim. There are many cases not within the statute, where, from a principle of quieting possession, the court has thought that a jury should presume anything to support a length of possession. LORD COKE says somewhere that an act of Parliament may be presumed; and of late it has been held that, even in the case of the crown, which is not bound by the statute of limitations,

the synopsis of the statute given in this section, this presumption is raised thereby. All instruments under seal, wherever executed, are specialties within the meaning of the statute, as bonds, deeds, leases, and all instruments executed in this manner, and even notes, or any contract sealed by the parties, whatever its nature, provisions, or purpose, come under this head.¹ As to matters of record, it may be said that none are to be regarded as such, unless made so by the law of and within the particular jurisdiction where the remedy is sought.

SEC. 30. **Judgments.**—A judgment obtained in the United States court, or in the courts of the State where the remedy is sought, is a specialty within the provisions of the statute;² but a foreign judgment, or one obtained in any other State or country, is a mere simple-contract debt, and as such is barred by the statute of the forum;³ nor unless the parties were personally served, or submitted to the jurisdiction of the court, is it more than *prima facie* evidence of a debt,⁴ and the statute

a grant may be presumed from great length of possession. It was so done in the case of *Hull v. Horner*, Cowp. 102, not that in such case the court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record, but they presume the fact for the purpose, and from a principle of quieting possession. But," he added, "there is no instance of setting up any length of time within the limitation fixed by the statute as a bar to the demand, and in cases of quit-rents, like the present, the reason for carrying back the limitation to the period fixed by the statute, namely, fifty years, is the stronger, because the consideration is so trifling. Though, if a real ground for supposing a release or extinguishment appeared, the smallness of the claim would have no weight. But in this case there is more length of time, which, barely as such, ought not to be received as a bar; and if so, the case stands without a pretence for supposing a release of extinguishment. Because, on the other hand, the exact time when the payment was first refused is no proof; and, further, the real or more probable ground of such refusal appears, namely, that the tenant had succeeded in an action between him and his lord; not that the lord had released it by any conveyance or the like; and if so, it might be good, while before the lord might think proper to bring an action for half-a-crown. Therefore, I am of opinion that it ought not to have been left to a pre-

sumption of law within a less time than the period fixed by the statute."

"A presumption," said ASTON, "from mere length of time, which is to support a right, is very different from a presumption to defeat a right."

¹ *Penrose v. King*, 1 Yeates (Penn.), 344; *Clark v. Hopkins*, 7 Johns. Ch. (N. Y.) 556; *Summerville v. Halliday*, 1 Watts (Penn.), 507. Judgment bonds are not within the statute, *Acheson v. Shepk*, 2 Leg. Gaz. (Penn.) 361; nor administration bonds (original), *Mittenberger v. Com.*, 14 Penn. St. 71; *Com. v. Patterson*, 8 Watts (Penn.), 515.

² As to judgments in the United States courts and holding them conclusive, see *Thompson v. Lee County*, 22 Iowa, 206; *Pigot v. Davis*, 3 Hawks (N. C.), 25; *Pease v. Bennett*, 17 N. H. 124; *Dorsey v. Mowry*, 18 Miss. 298; *Barney v. Patterson*, 6 H. & J. (Md.) 182; *Durant v. Essex Co.*, 8 Allen (Mass.), 103; *Arnold v. Booth*, 14 Wis. 180; *Buchanan v. Biggs*, 2 Yeates (Penn.), 232; *Shields v. Taylor*, 21 Miss. 127.

³ *Walker v. Witter*, 1 Doug. 1; *Darby v. Mayer*, 11 Wheat. (U. S.) 469; *Piatt v. Oliver*, 2 McLean (U. S. C. C.), 267. In Arkansas, an action upon a foreign judgment is limited to five years. *Brian v. Sims*, 10 Ark. 597.

⁴ *Wood v. Watkinson*, 17 Conn. 500; *Davidson v. Sharpe*, 6 Ired. 14; *Arndt v. Arndt*, 15 Ohio, 33; *Welch v. Sykes*, 8 Ill. 197; *Cheriot v. Foussat*, 3 Binn. (Penn.)

applies to such judgments, unless otherwise provided therein.¹ In those States in which the third section of Stat. 21 James I. is in force this rule prevails, as it does in all of them as to judgments of courts outside the United States; but in many of the States by statute "judgments or decrees of some court of record of the United States, or of this or some other of the United States," are all put upon the same footing, and excepted from the operation of the statute applicable to simple contracts; as in Maine, Vermont, Massachusetts, New York, Michigan, Arkansas, Alabama, Iowa, Wisconsin, California, Oregon, Minnesota, and Nevada. In Nebraska, all actions upon a specialty, or "upon any agreement, contract, promise in writing or foreign judgment," are barred in four years. In most of the other States the statutes are silent as to judgments, especially judgments of the courts of other States. In New Hampshire,² "actions of debt founded upon judgment or recognizance, or upon any contract under seal," are barred in twenty years. In Connecticut, bonds or other written obligations under seal and notes not negotiable are barred in seventeen years; and no special provision exists as to judgments nor is there any general provision relative thereto, thus leaving them to the common-law presumption arising from the lapse of twenty years. In Rhode Island, judgments come under the head of specialties, and under the general clause of sec. 1, like all specialties, are barred in twenty years. In New York, judgments and specialties are subject to the clause that provides that the

220; *Steel v. Smith*, 7 W. & S. (Penn.) 447; *Harness v. Green*, 20 Mo. 316; *Cameron v. Wurtz*, 4 McCord (S. C.), 278; *Hubbell v. Coudry*, 5 Johns. (N. Y.) 132; *Turner v. Lambeth*, 2 Tex. 365.

¹ *Bishop v. Sanford*, 15 Ga. 1; *Van Alstyne v. Lemons*, 19 Ill. 394; *Hubbell v. Coudry*, *ante*; *Pease v. Howard*, 14 Johns. (N. Y.) 470; *Walker v. Witter*, 1 Doug. 1; *Hay v. Fisher*, 2 M. & W. 722; *Kimball v. Whitney*, 15 Ind. 250. But in many of the States, as will be seen by the synopsis given of the statutes, the judgments of other States are put on the same footing as domestic judgments. But even in some of the States where no such provision exists it has been held that the judgments of courts of record of sister States are binding as judgments in all the States, and operate as a merger of the original claim. *Napier v. Gidiere*, Speers Ch. (S. C.) 215; *Clay v. Clay*, 13 Tex. 195; *Keith v. Estell*, 9 Port. (Ala.) 669; *Latourette v. Cook*, 5 Iowa, 513; *Moore v. Paxton*, 1 Hemp. (U. S. C. C.) 51. In Ohio any judgment of the courts of a sister State, whether of

a court of record or not, is treated as a specialty. *Stockwell v. Coleman*, 10 Ohio St. 33; and also see *Mahurin v. Bickford*, 8 N. H. 54, where it was held that a judgment of a justice of the peace rendered in another State was not within the statute. *Otway v. Ramsey*, Stra. 1090.

In *Dieffenbach v. Roch*, 112 N. Y. 621, it was held that although under the code upon the docketing of a justice's judgment in the county clerk's office, it becomes a statutory judgment of the county court; it is not a judgment "rendered" in that court, but remains "a judgment rendered in a court not of record," within the meaning of the provision of the code, declaring that an action upon such a judgment must be commenced within six years after a "final judgment was rendered," and an action to compel a set-off of such a judgment against a judgment of a court of record is an action upon the judgment, within the meaning of such provision, and is not maintainable after the lapse of six years from the time it was rendered.

² Rev. Stat. c. 181, § 5. See Appendix.

presumption of payment shall attach thereto after twenty years. In Maine, "every judgment and decree" are presumed to be paid and satisfied at the expiration of twenty years after any duty or obligation accrued by virtue of such judgment or decree; and this applies to judgments in other States and judgments of justices of the peace of that State; and although no provision exists for the rebuttal of this presumption, it is not absolute, and it may be rebutted by any competent proof.¹ In New Jersey, the language of 21 James I. as to specialties is adopted, and no provision is made as to judgments except a provision that all judgments of any court of record of that State may be revived by *scire facias* any time within twenty years after the date of judgment and not after. As to leases under seal, indented or poll, single or penal, bills for the payment of money only and awards under seal, the lapse of sixteen years after an action accrues thereon affords a bar.

SEC. 81. **Statutory Provisions as to.**—In Pennsylvania, the third section of Stat. 21 James I. is adopted, and specialties are not within the statute; and such also is the case in Maryland. In Mississippi, Tennessee, Kentucky, Florida, Virginia, North Carolina, South Carolina, and Georgia specialties are within the statute. In Alabama, the statute provides for actions upon any contract in writing under seal, and they are barred in ten years. The Wisconsin statute, in addition, includes judgments of courts of any of the Territories. In Delaware, actions founded upon a record or specialty are not within the statute, except so far as special cases are provided for; as actions upon sheriffs' recognizances, guardians' bonds, official obligations of certain State and county officers, specifically named, and bonds given to banks or other corporations in the State for the faithful discharge of the duties of officers or employés therein. In all other cases specialties are not within the statute. In Maine, no special provision is made for specialties; consequently they are embraced under the general section, which provides that all personal actions not otherwise provided for shall be barred in twenty years. In Vermont, judgments are barred in eight years, as also are all actions of covenant other than covenants of warranty and seisin contained in deeds, which are barred in eight years after the cause of action accrued, and actions of covenant for breaches of covenants of seisin and warranty in eight years after a final decision against the title of the covenantor in such deed; otherwise specialties are not within the statute. In Massachusetts, all specialties are embraced under the general provision that personal actions not otherwise limited shall be barred in twenty years. In Ohio, specialties, like all contracts in writing, are barred in twenty years; and in this State a recognizance for the stay of an execution²

¹ Jackson v. Nason, 38 Me. 85;
Knight v. Macomber, 55 Me. 132; Noble
v. Merrill, 48 Me. 140.

² Bobo v. Norton, 10 Ohio St. 567.

and a transcript of a judgment of another State¹ are regarded as specialties, but a domestic judgment is not.² An indorsement of a note is a contract in writing under this statute,³ and so is a subscription to the stock of a corporation.⁴ In Indiana, provision is made as to contracts in writing and those not in writing, and no distinction is made. In Illinois, actions for arrearages of rent accruing under a lease under seal, or upon any single or penal bill, promissory note, or writing obligatory, for the direct payment of money, or the delivery of property, or the performance of covenants, or upon an award under seal, are barred in sixteen years; judgments are barred in twenty years. In Michigan, all specialties, although not named, are within the general provision of the statute, and are barred in twenty years; and such also is the case in Wisconsin. In Missouri, all actions of debt upon contracts sealed and unsealed are put upon the same footing, and are barred in ten years, and by the statute all judgments are presumed to be paid within twenty years after their rendition; and the same provision exists as to all sealed instruments, which embraces all for the breach of which an action of debt will not lie. In Arkansas, all specialties come under the general provision, and are barred in five years; and judgments are presumed to be paid in ten years, and the same provision is applied to any instrument for the payment of money or delivery of property. In Iowa, no distinction is made between sealed and unsealed instruments, and both, as well as judgments of courts not of record, are barred in ten years, and judgments of courts of record in twenty years. In California, judgments of courts of record are barred in five years, and all obligations in writing in three years, but the statute does not begin to run until it is entered and recorded.⁵ In Oregon, actions upon sealed instruments are barred in ten years, upon a liability created by statute, except a penalty or forfeiture, in six years, and judgments and decrees of courts of record in ten years; so also in Minnesota. In Kansas, an action upon a "specialty," as well as any agreement, contract, or promise in writing, is barred in three years. In Nevada, no distinction is made between sealed and unsealed written instruments, and either are barred in four years, judgments of courts of record in five years, and statutory liabilities, except for penalties or forfeitures, in three years. In Nebraska, an action upon a specialty is barred in four years, except such bonds or obligations as are required by statute, which are barred in ten years, and judgments in four years. From the synopsis of our statutes relating to specialties it will be seen that there is a great lack of uniformity, and that much doubt and confusion may well arise under this head, under some of them; and it also demonstrates the necessity of bring-

¹ *Bissell v. Jandon*, 16 Ohio St. 498.

² *Tyler v. Winslow*, 15 Ohio St. 364.

³ *Haines v. Thorp*, 15 Ohio St. 136.

⁴ *Warner v. Callender*, 20 Ohio St. 190;

Gibson v. C. & N. Tr. R. R. Co., 18 id. 396.

⁵ *Crim v. Kissing*, 89 Cal. 478.

ing together the gist of the decisions as to what classes of claims are to be regarded as specialties.

SEC. 32. Rent, Actions for. — Actions for rent accruing under a lease under seal are not within the statute,¹ and the words "actions of debt for arrearages of rent" contained in the statute of James, and those which adopt its language in this respect, are held not to include actions for rent accruing under a specialty.² But for rents accruing under a lease under seal which is so defectively executed as not to be operative as a lease,³ or under a parol demise,⁴ the action is within the statute, and comes within the class of rents embraced within and intended by the words "actions of debt for arrearages or rent."⁵ But in many of the States the language of the statute is such as to embrace actions of debt for arrears of rent, whether they accrue under a lease by specialty or parol. Thus, in Maine, the language of the statute is, "all actions for arrears of rent:"⁶ the same is also the case in Vermont⁷ (and in both States the action is barred in six years). In Massachusetts,⁸ except upon leases under seal. In Michigan,⁹ same as in Maine and Wisconsin.¹⁰ In New Hampshire, such actions come under sec. 5, and are barred in twenty years.¹¹ In Connecticut, this class of actions accruing under a lease under seal are barred in seventeen years.¹² In New Jersey, such actions are barred in sixteen years.¹³ In Delaware, this class of actions is not within the statute.¹⁴ In South Carolina, such actions are barred in six years.¹⁵ In Alabama, an action for arrearages of rent due on a lease under seal¹⁶ is barred in ten years. In Ohio, actions upon "specialties" are limited to fifteen years, and actions upon other contracts to six years.¹⁷ In

¹ Pease v. Howard, *ante*; Buffum v. Deane, 4 Gray (Mass.), 385.

² In Freeman v. Stacy, Hutt. 109, there was a lease by indenture for twenty years rendering rent. In an action of debt thereon it appeared that the arrearages sued for accrued more than six years before the action was brought. It was held that the action being for rent which accrued under a lease by indenture, it was not within the statute. RICHARDSON, J., at first inclined to the opinion that the action was barred by the statute, because the statute extends to arrearages of rent; but he afterwards changed his mind, and agreed with the other judges that this action of debt, being upon a lease by indenture, is not within the statute. "The words are," said he, "'all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent,' &c., and this is an action upon a contract by specialty." See also Collins v. Goodal, 2 Vern. 235; Hodson v. Harridge,

2 Saund. 66; Stackhouse v. Barnston, 10 Ves. 453; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; Davis v. Shoemaker, 1 Rawle (Penn.), 135; McQuesney v. Heister, 33 Penn. St. 435; Vechte v. Brownell, 8 Paige Ch. (N. Y.) 212.

³ Lansdell v. Gomer, 17 Q. B. 589.

⁴ Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; Elder v. Henry, 2 Sneed (Tenn.), 81.

⁵ Kane v. Bloodgood, *ante*; Elder v. Henry, *ante*.

⁶ Maine, Appendix.

⁷ Vermont, Appendix.

⁸ Massachusetts, Appendix.

⁹ Michigan, Appendix.

¹⁰ Wisconsin, Appendix.

¹¹ New Hampshire, Appendix.

¹² Connecticut, Appendix.

¹³ New Jersey, Appendix.

¹⁴ Delaware, Appendix.

¹⁵ South Carolina, Appendix.

¹⁶ Alabama, Appendix.

¹⁷ Ohio, Appendix.

Illinois, actions upon leases are barred in ten years.¹ In Missouri, Iowa, and Oregon, all actions founded upon any writing, under seal, are barred in ten years,² and in Indiana in twenty years. In Kansas, "an action upon any agreement, contract, or promise in writing" is barred in five years after the cause of action thereon accrues.³ In Nevada, specialties are not enumerated, but this class of actions comes under the general provisions of sec. 16, and is barred in five years;⁴ and in Nebraska, actions upon a specialty are barred in four years.⁵ Thus it will be seen that in several of the States actions for the recovery of rent or arrearages of rent accruing upon a lease under seal are not within the statute, and are left to the operation of the common-law presumption from the lapse of twenty years, or come within the provisions of general clauses applying to all causes of action not specially provided for.

SEC. 33. **Avowry for Rent.** — An avowry for rent created by deed, as for a rent-charge, has been held to be a specialty;⁶ so, an action for rent originally created by act of Parliament;⁷ but an action for rent reserved on a parol lease, or lease not under seal, is within the statute.⁸ An action for an escape is not within the statute,⁹ nor debt for a copyhold fine,¹⁰ nor for not setting out tithes,¹¹ nor against a sheriff for money which he levied on a *fiery facias*,¹² nor upon an award under the seal of the arbitrators;¹³ nor is a warrant of attorney within the statute.¹⁴

¹ Illinois, Appendix.

² Missouri, Oregon, Iowa, Appendix. See also California, Appendix, where all written contracts are put on the same footing and are barred in four years. In Minnesota, all actions on contracts, express or implied, are barred in six years.

³ Kansas, Appendix.

⁴ Nevada, Appendix.

⁵ Nebraska, Appendix.

⁶ Co. Litt. 115 a; Foster's Case, 8 Coke, 64; Faulkner v. Bellingham, 1 W. Jones, 237; Bacon's Abr. 227, D, 1.

⁷ Faulkner v. Bellingham, Cro. Car. 81.

⁸ Freeman v. Stacy, Hutt. 109.

⁹ Jones v. Pope, 1 Saund. 37.

¹⁰ For the reason that it is not founded on a contract of lending. Hodgdon v. Harris, 1 Lev. 373.

¹¹ Talony v. Jackson, Cro. Car. 513.

¹² Cockram v. Welby, 2 Mod. 212.

¹³ Hodson v. Harridge, 2 Saund. 64; Rank v. Hill, 2 W. & S. (Penn.) 56; Smith v. Lockwood, 7 Wend. (N. Y.) 241. In Green, &c. v. S. P. R. R. Co., 64 Penn. St. 79, it was held that an award, although the submission is by parol, is not within

the statute, but that when property is purchased at a price to be assessed by appraisers, the valuation is not an award, and that the statute bars an action thereon after six years, as it is a contract without specialty. But where a submission is by parol, and the award by parol, assumpsit lies thereon, as we have seen, and the award is within the statute, and can in no sense be said to be a specialty. In Hodson v. Harridge, *ante*, the award was required to be, and in fact was, under seal. When the submission is under seal the award is a specialty, although not under seal, and cannot be sued for in assumpsit, consequently is not within the statute as to simple contracts. Holmes v. Smith, 49 Me. 242; McCargo v. Crutcher, 23 Ala. 575; Horton v. Ronalds, 2 Port. (Ala.) 79; Tullis v. Sewell, 3 Ohio, 10.

¹⁴ Morris v. Hannick, 21 Pittsb. L. J. (Penn.) 199. But while it was at one time thought that an action by an attorney for his fees is not within the statute, because they depend upon a record, 1 Mod. 246; yet, as we have seen, such is not the rule.

SEC. 34. Foreign Judgments. — Foreign judgments, as we have seen, are regarded as within the statute; but this is not the case when the judgment was predicated upon a specialty, because in such cases the court looks beyond the judgment to the claim on which it is based; and if the original claim would not be barred, the judgment is not.¹ Thus, where a judgment obtained in New Brunswick was sued in Maine, the Supreme Court of that State held that, as the original claim was a witnessed promissory note, which is excepted from the operation of the statute of that State applicable to simple contracts, the statute did not apply.² In Ohio and in New Hampshire it has been held that even a judgment of a justice of the peace rendered in another State is a specialty, and not within the statute.³ But in most of the States only judgments of courts of record are excepted from the operation of the statute; and in those States, and indeed, it is believed, in all of them except the two referred to, the judgment of a justice of the peace of another State, or even of that State, cannot and would not be regarded as a specialty,⁴ unless by statute justices' courts are made courts of record.⁵

SEC. 35. Mixed Claims, Instances of. — A party may have a claim that is mixed, that is, both a simple contract and a specialty, and may have his choice of remedies thereon. Especially is this the case where a note is secured by a mortgage of lands, or even of personalty where the mortgage is under seal. In such cases the note, not being under seal, is a simple contract, although it is recited in the mortgage, and the statute runs against it as against other simple contracts; but the mortgage is a specialty, and may be enforced at any time within twenty years (if that is the statutory period for barring specialty debts in the State where action is brought), although the

¹ *Richards v. Bickley*, 13 S. & R. (Penn.) 395.

² *Jordan v. Robinson*, 15 Me. 167.

³ *Stockwell v. Coleman*, *ante*; *Mahnin v. Bickford*, 8 N. H. 54. See also *Robinson v. Prescott*, 4 N. H. 45, where such a judgment is held not to be conclusive, but as standing upon the same footing as any foreign judgment.

⁴ *Mowry v. Cheesman*, 6 Gray (Mass.), 515.

⁵ In New York, while the court held that a justice's judgment is not within the statute, *Pease v. Howard*, 14 Johns. (N. Y.) 479, judgments of the marine court were held to be within it, *Lester v. Redmond*, 6 Hill (N. Y.), 590. But now, in New York, justices' judgments are barred in six years, *Nicholls v. Atwood*, 16 How. Pr. (N. Y.) 475; and on judgments of the marine court in twenty years,

Conger v. Vandewater, 1 Abb. Pr. (N. Y.) N. s. 126. In Mississippi, the statute is held to apply to a decree of the Probate Court, *Delworth v. Carter*, 32 Miss. 206; but otherwise in Pennsylvania, *Burd v. McGregor*, 2 Grant (Penn.), 353. In Maine, a judgment of the county commissioners is held to be within the statute, *Woodman v. Somerset*, 37 Me. 29; and in Massachusetts a judgment of the police court of Lowell was held not within the statute, *Bunyan v. Murphy*, 13 Met. (Mass.) 251. Indeed, in all cases the question whether a judgment is within the statute or not depends entirely upon the circumstance whether it is the judgment of a court of record; and this depends, not upon the circumstance whether records are required to be kept or not, but whether it is declared so to be by the law creating it.

effect is to enforce the payment of a simple-contract debt.¹ A distinction exists between an action growing directly out of, and predicated and dependent upon, a specialty, and which cannot exist independent thereof, and one that is only incidental thereto, and can be maintained without resort to the specialty. Thus, an action of assumpsit will not lie upon a specialty,² as upon an insurance policy under seal,³ or a bond,⁴ or for work done or materials furnished under an instrument under seal.⁵ But this rule only exists when the right of action rests upon the specialty, or derives its vital force therefrom. If the specialty contract has been rescinded, waived, or departed from by an agreement not under seal, so that a promise independent of that expressed in the specialty can be implied, then the debt or cause of action ceases to be a specialty debt,⁶ and an action can be supported independent of the sealed contract.⁷ This exception arises in numerous instances. Thus, where a partnership is formed by indenture or an instrument under seal, *prima facie*, all actions, &c., for an accounting, between the parties, must be predicated directly upon the articles; but if one of the partners dies, and the other promises by parol to account to his executor, an action of assumpsit may be brought upon such promise; and the action not being founded upon the indenture, although an incident thereto, the statute applies as to such action, although a suit upon the specialty for an accounting would not be barred.⁸ So where one co-obligor under a bond has been compelled to

¹ Pratt v. Huggins, 29 Barb. (N. Y.) 227.

² Hinckly v. Fowler, 15 Mass. 285; Fletcher v. Piatt, 2 Blackf. (Ind.) 522.

³ Marine Ins. Co. v. Young, 1 Cranch U. S.), 332; Stroehel v. Large, 3 McCord (S. C.), 114.

⁴ Andrews v. Montgomery, 19 Johns. (N. Y.) 162; Brown v. Houdlette, 10 Me. 899.

⁵ Porter v. Androscoggin R. R. Co., 37 Me. 349.

⁶ Aiken v. Bloodgood, 12 Ala. 221; Little v. Morgan, 31 N. H. 499; Gilman v. School Dist., 15 id. 215; Pierce v. Lacy, 23 Miss. 193; Brown v. Gauss, 10 Mo. 265.

⁷ Charles v. Scott, 1 S. & R. (Penn.) 294; Gilmore v. Pope, 5 Mass. 497; Dutchess Cotton Co. v. Davis, 14 Johns. (N. Y.) 238.

⁸ Codman v. Rogers, 10 Pick. (Mass.) 112.

In Gray v. Green, 125 N. Y. 203, the parties, prior to 1871, were co-partners; in that year the firm was dissolved by mu-

tual consent, and the plaintiff was, by the agreement of dissolution, made the liquidating partner. In this action brought in 1884 for an accounting, &c., the complaint alleged that upon the dissolution the defendant retained possession of firm assets exceeding in amount his partnership interest, which excess was due and payable to the plaintiff. The defendant's answer denied these averments and alleged that a settlement was made at the date of the dissolution, and also set up the statute of limitations as a defence. It was held, that the action was barred by the statute; that the plaintiff, by the agreement became the authorized agent of the partnership, and as such, it was his duty to collect and realize its assets; that the claim against the defendant was an asset, and so it was the plaintiff's duty to collect it; that the cause of action, therefore, accrued immediately upon the dissolution.

The distinction between such a case and one where an action is brought against the liquidating partner, or where an action is brought against the estate of a deceased

pay the whole amount secured thereby, he may bring assumpsit against the other for contribution, because, although the original indebtedness arose out of the bond, which is a specialty, yet the claim upon which the action is predicated rests not upon the bond, but upon the promise which the law implies, on the part of co-obligers, to share equally the pecuniary consequences of their venture;¹ and this distinction, to wit, between an action founded upon and created by a specialty, and one which, although an incident of a specialty, yet rests upon an express or implied promise, is necessary to be observed, as in the former instance the statute does not apply, while in the latter it does. This matter may be illustrated in the case of a legacy, while a plea of the statute of limitations, to an ordinary action for its recovery, cannot be interposed, unless the statute expressly so provides;² and this is also the rule in courts of equity;³ but if there exists a liability upon the executor because he has personal assets in his hands,⁴ so that the law can, or will, raise an implied promise on the executor's part to pay it, or if he has expressly promised to pay it over, then assumpsit lies therefor;⁵ and to this express or implied promise the statute would apply; but it only bars the action upon the promise; it does not defeat the legatee's remedy for the legacy by the ordinary remedies therefor. In such cases, in some instances, it has been held that the statute applies after the expiration of the period fixed in the will for payment, and demand has been made for payment;⁶ and such also is the case when the trust is ended and there has been a settlement between the executor and legatee.⁷ So, also, it has been held that assumpsit will lie to recover a balance struck, although the account going to make up such balance embraces specialties;⁸ or upon a promise to pay the assignee of a specialty;⁹ and generally, it may be said, assumpsit lies whenever there

partner, is simply this, in the case of a liquidating partner, he is entitled to a reasonable time within which to perform the duties of his trust, and until its expiration a right of action against him does not accrue; while in the case of a deceased partner, a cause of action against his estate for contribution accrues when the partnership business has been so far settled as to demonstrate the need of contribution and indicate the amount required.

Hammond v. Hammond, 20 Ga. 556, disapproved.

¹ *Penniman v. Vinton*, 4 Mass. 276.¹

² *Perkins v. Cartwell*, 4 Harr. (Del.) 270; *Thompson v. McGaw*, 2 Watts (Penn.), 161; *Doebler v. Snaveley*, 5 id. 225; *Durdon v. Gaskill*, 2 Yeates (Penn.), 268. In Louisiana, such actions are barred in ten years. *Nolasco v. Lurtz*, 13 La. An. 100.

³ *Thompson v. McGaw*, *ante*.

⁴ *Goodwin v. Chaffee*, 4 Conn. 166. But in this case there were no assets in the hands of the executor without resorting to the realty, and for this reason the court held that assumpsit would not lie, as the law could not raise an implied promise. See also *Knapp v. Hanford*, 6 id. 174.

⁵ *Woodruff v. Woodruff*, 3 N. J. L. 552; *Cowell v. Oxford*, 6 id. 432; *Clark v. Herring*, 5 Binn. (Penn.) 33; *Goodwin v. Chaffee*, *ante*; *Farwell v. Jacobs*, 4 Mass. 635; *Warren v. Rogers*, 2 Root (Conn.), 156.

⁶ *Young v. Cook*, 30 Miss. 320.

⁷ *Young v. Cook*, *ante*; *Thompson v. McGaw*, *ante*.

⁸ *Gilson v. Stewart*, 7 Watts (Penn.), 100; *Miller v. Watson*, 7 Cow. (N. Y.) 39.

⁹ *Compton v. Jones*, 4 Cow. (N. Y.) 13.

is an express promise, or the law will raise an implied promise as an incident of the specialty;¹ and in such cases the statute runs against the assumpsit, but not against the specialty obligation, and remedies, There being no statutory provision as to legacies in this country, the law upon this subject here stands as it did in England prior to the adoption of the statute 3 & 4 Wm. IV.,; and there is no limitation against a trust, as there was none under Stat. 21 James I. c. 16;² and executors and administrators being express trustees, they cannot set up the statute against the claims of legatees or distributees.³ In an English case,⁴ LORD NOTTINGHAM held that a legacy was not barred by the statute, "nor ever had been so."⁵ But this matter will

¹ Baird v. Blagrove, 1 Wash. (Va.) 176; Arnold v. Hickman, 6 Munf. (Va.) 15; Hills v. Elliott, 12 Mass. 26; Jones v. Law, 4 Humph. (Tenn.) 338; Wiloughby v. Spear, 4 Bibb (Ky.), 379.

² Hollis's Case, 2 Ventr. 345; Brittlebank v. Goodwin, L. R. 5 Eq. 545; Hargreaves v. Michell, 6 Madd. 326; Yingling v. Hesson, 16 Md. 112; Barker v. Martin, 5 Sim. 380; O'Bee v. Bishop, 1 De G. F. & J. 137; Wedderbern v. Wedderbern, 2 Keen, 722.

³ Bailey v. Shannonhouse, 1 Dev. Eq. (N. C.) 416; Lafferty v. Turley, 3 Sneed (Tenn.), 157; Amos v. Campbell, 9 Fla. 187; Picot v. Bates, 39 Mo. 292; Smith v. Smith, 7 Md. 55; Knight v. Brawner, 14 id. 1.

⁴ Anonymous, 2 Freem. 22 pl. 20.

⁵ Parker v. Ash, 1 Vern. 257; Sparhawk v. Buel, 9 Vt. 41; Wood v. Ricker, 1 Paige Ch. (N. Y.) 616; Cartwright v. Cartwright, 4 Hayw. (N. C.) 134; Doebler v. Snively, 5 Watts (Penn.), 225; Norris's Appeal, 71 Penn. St. 120; Irby v. McCrea, 4 Desau. (S. C.) 422; McCarter v. Camel, 1 Barb. Ch. (N. Y.) 455; Perkins v. Gartnell, 4 Harr. (Del.) 270; Lauzer v. De Meyer, 2 Paige Ch. (N. Y.) 575; Smith v. Remington, 42 Barb. (N. Y.) 75; Lafferty v. Turley, 3 Sneed (Tenn.), 157. In Massachusetts, the bar of the statute is expressly excluded. See Appendix; also Brooks v. Lynde, 7 Allen (Mass.), 64; Kent v. Dunham, 106 Mass. 586.

In Sheldon v. Sheldon, 133 N. Y. 1, it was held, that a legacy given to a creditor of the testator of more than the amount of the debt, does not operate as a payment of the debt, in the absence of any words

in the will from which an intent to extinguish the debt can be inferred.

In an action for an accounting for moneys alleged to have been received in 1864 by S., defendant's testator, who died in 1880, for the use of the plaintiff, the wife of S., the statute of limitations was pleaded as a defence. The trial court found that the money in question was received by S., upon an agreement with plaintiff that he should control and invest the same for her benefit, and when requested, account to her for the same and the increase from investments thereof; held, that in view of the finding, the statute was not a defence; nor was it a defence that upon the accounting by defendants as executors, after due notice for the presentation of claims, no claim was presented by the plaintiff.

But it was held, that the finding could not be sustained upon evidence simply showing the receipt of the money by S. upon an agreement to pay it to the plaintiff on request, and that if the money was so received the claim would be barred by the statute. In the case last cited it appeared that S. received the money, which was the proceeds of the sale of lands belonging to the plaintiff. The evidence relied upon to sustain this finding consisted of statements made by S. to different persons: one to the attorney at whose office the sale was consummated, to the effect that the lands standing in the plaintiff's name and the avails thereof when sold belonged to her, and that he desired she should have the benefit of it at his death, if not before; the other was to the effect that his wife had money which he was using and investing

be more fully treated under the head of Executors and Administrators, and its further consideration in this place will not be profitable.

SEC. 36. Liability created by Statute. — In all cases where liability is created by the positive requisitions of a statute, and not by the act of the parties themselves, the liability is treated as being in the nature of a specialty, and is not within the Statute of 21 James, nor within the statutes adopted in the several States applicable to simple contracts, unless expressly made so by the statute itself.

SEC. 37. Special Statutory Provisions relating to Specialties. — In Maine,¹ contracts under seal are excepted from the operation of the statute; but it is provided by sec. 25 that judgments and decrees of any court of record of the United States, or of that or any other State, or of a justice of the peace of that State, shall be presumed to be paid and satisfied at the expiration of twenty years after any duty or obligation accrued by virtue of such judgment or decree, and no provision is made for any renewal of the same by any acknowledgment or payment. In Vermont,² actions of debt or *scire facias* on judgments must be brought within eight years after the rendition of the judgment, and also all actions of debt on specialties;³ and also all actions of covenant, except covenants of warranty and seisin, are barred within eight years next after the cause of action accrued; and all actions of covenant on any covenant of warranty or seisin, within eight years next after there shall have been a final decision against the title of the covenantor; and on covenants of seisin, within fifteen years from the time when the cause of action accrued. In New Hampshire, actions of debt founded upon any judgment or recognizance, or upon any contract under seal, may be brought within twenty years; and mortgage notes are not barred until the mortgage itself is;⁴ and in Massachusetts⁵ actions upon this class of claims are barred in twenty years. So also in Rhode Island.⁶ In Ohio,⁷ all actions upon specialties are barred in fifteen years. In Michigan,⁸ specialties come under the general provisions of the statute, and are barred

for her. It appeared that S., in 1879, executed to plaintiff a note which stated the consideration to be "cash borrowed." She made a claim thereon against the estate, and the same was paid by the executors. She made no claim for the money in question until three years after final settlement of the executor's accounts. Due notice to present claims was published, and the decree on such settlement cited that all parties appeared. The plaintiff was paid in full a legacy given her by the will. It also appeared that about the time of the sale of the land two mortgages were executed to plaintiff, one by one of the grantees upon

other land, which together amounted nearly to the purchase-money so received by S., and the plaintiff executed discharges of the mortgages which acknowledged payment thereof in full. It was held that the evidence did not sustain the finding.

¹ Appendix, Maine.

² Appendix, Vermont.

³ Sec. 10 of the act.

⁴ Appendix, New Hampshire.

⁵ Appendix, Massachusetts.

⁶ Appendix, Rhode Island.

⁷ Appendix, Ohio.

⁸ Appendix, Michigan.

in twenty years. So also in Wisconsin.¹ In Oregon,² all actions upon specialties, including foreign judgments, are barred in ten years. In California,³ actions upon judgments, must be brought within five years, and actions upon any contract or obligation in writing within four years; and by a general clause, all actions for relief not otherwise provided for are barred in four years, and this brings all specialties under the same head. In Minnesota,⁴ all contracts or other obligations in writing are barred in six years, including actions upon any liability created by statute, except penalties and forfeitures where the penalty is given to the party aggrieved, which are barred in three years, and actions upon a forfeiture or penalty to the State, which is barred in two years, and upon penal statutes where the penalty is given in whole or in part to the person who prosecutes, which are barred in one year; and all matters not otherwise provided for are barred in ten years, which necessarily embraces all specialties not specially provided for. In Kansas, all actions upon specialties are barred in three years. In Nevada,⁵ specialties come under the general clause of sec. 18, and are barred in three years, except actions upon a statute other than a penalty or forfeiture; and for a penalty or forfeiture to the State in two years, and also where it is given to an individual. In Nebraska,⁶ actions upon specialties are barred in four years, except statutes for a penalty or forfeiture, which are barred in one year.

SEC. 38. **When Concurrent Remedy is given by Statute.** — From this summary it will be seen that in several of the States this class of claims are not embraced within the statute, but are left either to the operation of statutory or common-law presumptions. But, as we have seen, it is only where the statute creates the liability, and is directly the ground of the action,⁷ that it is exempt from the operation of the statute. Thus, where property is taken under a statute which also provides a remedy for the assessment of consequential or other

¹ Appendix, Wisconsin.

² Appendix, Oregon.

³ Appendix, California.

⁴ Appendix, Minnesota.

⁵ Appendix, Nevada.

⁶ Appendix, Nebraska.

⁷ Under the New York statute referred to *ante*, an action was brought against a stockholder of an incorporated trading company, the charter of which provided that a creditor might, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder therefor. It was held that the action was not barred in three years, under the provisions of the statute referred to, *ante*, because the liability was not created by statute, but was a valid claim for six years.

Corning v. McCullough, 1 N. Y. 47. But while in this case the form of the action was assumpsit, it is difficult to appreciate the reasoning of the court that the liability was not created by statute. It is true that the original claim upon which the judgment sought to be enforced against the stockholder was created by the act of the parties, but the defendant's liability therefor was created by the statute, and could not exist independently of it; and this being the case, we are decidedly of the opinion that the decision is wrong, and that the doctrine expressed by STORY, J., in Bullard v. Bell, 1 Mas. (U.S.C.C.) 248, in a case involving a similar question, is the true one.

damages, the statute does not apply.¹ But if, instead of resorting to his statutory remedy, a party resorts to his legal title and common-law remedy, as trespass or ejectment, the statute bars his claim as to past damages in six years.² The doctrine stated *supra* was well expressed by STORY, J., in a case where, under the statute, it was sought to recover a debt against a corporation against one of its stockholders. The action was debt, and the defendant insisted that the action would not lie, as the undertaking was collateral, and was barred in six years, as any other simple contract would be. But the court held that, as the statute created the liability, and the right of action would not exist independently of it, the case was not within the statute of limitations then existing in New Hampshire (where the action arose), which, so far as "specialties" are concerned, was identical with the Statute 21 James I.

He said: "I agree at once to the position that the bills of the bank are to be considered originally as the debts of the corporation, and not of the corporators; and, except from some special provision by statute, the latter cannot be made answerable for the acts or debts of the former. They are altogether in law distinct persons, and capable of contracting with each other. But the corporators are not strangers to the corporation. On the contrary, the law contemplates a privity between them; and upon that privity has created an obligation on the corporators, under certain circumstances, to pay the debts of the corporation. Nothing can be better settled than that an action of debt lies for a duty created by the common law or by custom; *a fortiori* it must lie where the duty is created by statute. Whatever is enjoined by statute to be done creates a duty on the party, which he is bound to perform. The whole theory and practice of practical and civil obligations rest upon this principle. When therefore, a statute declares that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration may be collateral or not; but it is not a subject of inquiry, and to deny that it is a duty on the stockholder to pay the money is to deny the force of the statute itself, for a duty is nothing more than a simple obligation to perform that which the law enjoins. Here, then, the law has declared that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty to do so. How, then, can the court say that debt does not lie, since there is a duty on the defendant to pay a determinate sum of money? There is no reason, under this view of the case, for entertaining any question as to collateral undertakings. The law has created a direct

¹ *Hannum v. West Chester*, 63 Penn. 404. A municipal assessment is not within the statute. *Council v. Moyamensing*, 2 Penn. St. 224; *Magae v. Chambersburgh*, 46 id. 358.
² *McClinton v. Pittsburgh, &c. R. R. Co.*, *ante*,
St. 475; *Foster v. Cumberland Valley R. R. Co.*, 23 id. 371, holding a contrary doctrine, was overruled by *Delaware, L. & W. R. R. Co. v. Burson*, 61 id. 369; *McClinton v. Pittsburgh, &c. R. R. Co.*, 66 id.

liability, — a liability as direct and cogent as though the party had bound himself under seal to pay the amount, in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty. Indeed, if debt would not lie in this case, it is inconceivable how assumpsit could. There is no pretence of any express promise; and if a promise is to be implied, it must be because there is a legal liability, independent of any promise to sustain one. Now, the very notion of a collateral undertaking is, that there exists no legal liability, independent of the promise to create a duty. And if there exist a duty sufficient to create a promise, then it is sufficient to sustain an action of debt.”

SEC. 39. **Test as to whether Specialty or not.** — It may be said that the test by which to determine whether a statute creates a specialty debt or not is, whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether independently of the statute a right of action exists for the breach of the duty or obligation imposed by the statute. If so, then the obligation is not in the nature of a specialty, and is within the statute, so long as the common-law remedy is pursued; but if the statute creates the duty or obligation, then the obligation thereby imposed is a specialty, and is not within the statute. If the statute imposes an obligation, and gives a special remedy therefor, which otherwise could not be pursued, but at the same time a remedy for the same matter exists at the common law independently of the statute, and the statute does not take away the common-law remedy, the bar of the statute is effectual when the common-law remedy for the breach of the common-law duty or liability is pursued, but is not applicable when the special statutory remedy is employed.¹ It must be understood, however, that if the statute merely changes the remedies existing before and the change is general as to a particular class of liabilities existing before, no change arises therefrom as to the application of the statute of limitations, as it is not the nature of the remedy, but of the claim upon which the remedy is predicated, that determines this question.²

¹ *McClinton v. Pittsburgh, &c. R. R. Co.*, ante. In *Hannum v. West Chester*, 63 Penn. St. 475, it was held that, where property has been damaged by a public improvement, the statute of limitations does not apply to the remedy given by the statute therefor; but in the case first cited in this note, where lands were taken for railroad purposes, it was held that, if the land-owner pursued the statutory remedy, the statute of limitations did not apply thereto, but that if he resorted to his legal title and brought ejectment, as to that remedy, the statute did apply.

² *Murray v. East India Co.*, 5 B. & Ald.

204; *Coply v. Dormique*, 2 Lee, 166; *Freeland v. McCullough*, 1 Den. (N. Y.) 414. In *De Haven v. Bartholomew*, 57 Penn. St. 122, the court very pertinently say, it is the nature of the cause of action, and not the remedy itself, which determines the applicability of the statute. In a New York case, *Pease v. Howard*, 14 Johns. (N. Y.) 479, the court say, “The words ‘action of debt founded upon any contract without specialty,’ only embrace debts founded upon contract in fact, not such as arise by construction of law.”

SEC. 40. Actions for Distributive Share of Estate.—Actions for the distributive share of the personal estate of an intestate are not within the statute,¹ nor are the ordinary actions for the recovery of legacies, as none of the statutes in this country have adopted the provisions of the statute 3 & 4 Wm. IV. c. 27, the fortieth section of which bars all action for the recovery of legacies after the lapse of twenty years.² The first-named English statute applies to all legacies, whether charged upon land or not,³ and also to residuary property.⁴ Previously to that act, in England, as is still the case in this country, the right of a legatee was never barred except by presumption of payment, and this presumption could never be raised when contrary to the duty of the executor. In all cases, as well under this statute as in the case of presumptions, neither the statute nor the presumption of payment attaches until twenty years after a present right to receive the same.

SEC. 40 a. Patents, Application of Statute to.—The question whether the statute of limitations in the several States apply to actions for the infringement of patents has never been decided by the Supreme Court of the United States, and the question has been variously decided in the different circuits.⁵

The great weight of authority is to the effect that such statutes do not apply,⁶ and, in my judgment, this is the correct doctrine. At the common law no protection whatever is afforded to an inventor. The right and the remedy are both created by statute and given by act of Congress. Not only does the act provide what the remedy shall be, but it also gives exclusive jurisdiction over that remedy to the circuit courts; and no action for an infringement of the rights secured by letters-patent can be maintained in the State courts or in any other court than the circuit court, as provided in the act. The rule which applies when there is a concurrent jurisdiction has no application, and it is quite evident that these statutes were never intended to be applied ex-

¹ *Pennepacker v. Pennepacker*, 2 Clark (Penn.), 114; *Patterson v. Nicholl*, 6 Watts (Penn.), 379; *Gemberling v. Meyer*, 2 Yeates (Penn.), 341, holding a contrary doctrine, was directly overruled by *Pennepacker v. Pennepacker*, *ante*.

² See Stat. 3 & 4 Wm. IV. § 40, Appendix. By sec. 9, Stat. 37 & 38 Vict. c. 57, the period has been reduced to twelve years.

³ *Sheppard v. Duke*, 9 Sim. 567; *Bullock v. Downes*, 9 H. L. Cas. 1.

⁴ *Prior v. Hornblow*, 2 Y. & C. Ex. 200.

⁵ In the following cases it has been held to apply. *Parker v. Hawkes*, 2 Fish. Pat. Cas. 58; *Hayden v. Oriental Mills*, 15 Fed. Rep. 605; *Rich v. Ricketts*, 7

Blatch. (U. S. C. C.) 230; *Sayles v. Railroad Co.*, 6 Sawyer (U. S. C. C.), 31.

⁶ *May v. Buchanan*, 29 Fed. Rep. 469; *Wood v. Cleveland Rolling Mills*, 4 Fisher, 550; *Collins v. Peebles*, 2 id. 541; *Parker v. Hallock*, 2 id. 543; *Witherill v. New Jersey*, 1 B. & A. (U. S. C. C.) 105; *Reed v. Miller*, 2 Biss. (U. S. C. C.) 12; *May v. Co. of Rolls*, 31 Fed. Rep. 473; *May v. Cass Co.*, 30 id. 762; *Sayles v. Louisville, &c. R. R. Co.*, 9 id. 515; *May v. Buchanan Co.*, 29 id. 469; *Hayward v. St. Louis*, 11 id. 427; *May v. Fondulac*, 27 id. 691; *McGinnis v. Erie Co.*, 45 Fed. Rep. 91; *May v. Cass Co.*, 30 id. 762; *Witherill v. Zinc Co.*, 1 B. & A. (U. S. C. C.) 485.

cept to common-law remedies, and remedies which could be enforced in the State courts, and over which those courts had jurisdiction. It is preposterous to suppose that State legislatures would attempt even to limit or control a right given by Congress and upon which Congress itself has imposed no limitations. That it was not intended by Congress that statutes of limitations should apply to actions for the infringements of patents is evident from the fact that the act passed by Congress limiting the time within which such actions should be brought was very soon afterwards repealed. Where a right is created by statute, and has no existence except as a creation of the statute, and a specific and exclusive remedy is given therefor, it is regarded as a specialty, and in any event, if the State statute should be held applicable to this class of actions, it would only be subject to the statute which applies to specialty obligations; and in most of the States it is held that the statute of limitations has no application to actions predicated upon a statute, unless it is specially so provided.¹

¹ See *ante*, p. 55, § 19, and notes thereto. See also § 36, p. 90; also §§ 38, 39, pp. 91-93, and authorities cited.

CHAPTER IV.

AVAILABLE FOR AND AGAINST WHOM.

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| <p>SEC. 41. Personal Privilege.
 42. Limitations by Contract.
 43. Effect of War upon Conditions.
 44. Premature Actions.
 45. When Adjustment is essential.
 46. Effect of Appointment of Receiver.
 47. Parol Contracts.</p> | <p>SEC. 48. Commencement of Action, What is.
 49. Delay induced by Defendant.
 50. When Claim arises.
 51. Waiver of Limitation.
 52. Against whom Statute may be enforced. State.
 53. Municipal Corporations. Counties, &c.</p> |
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SEC. 41. **Personal Privilege.** — The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant, or asserted, at his election; but where he has parted with his interest in property, his grantees, mortgagees, or other persons standing in his place are entitled to avail themselves of all the advantages of this plea.¹ But it has been held that an equitable owner of land, subject to a ground-rent reserved by deed, cannot interpose the statute as a bar to an action for the rent.² A *cestui que trust* may set up the statute whenever his trustee might do so;³ and where an executor or administrator in an action against him, as such, fails to plead the statute, the heirs or legatees may take advantage of it when the creditor undertakes to subject the lands in his hands to the debt;⁴ and generally any person in privity with the claim sought to be enforced may set up the statute in bar thereto, as an executor, administrator, assignee,⁵ trustee, or any

¹ *Grattan v. Wiggins*, 23 Cal. 16; *Lord v. Morris*, 18 id. 482; *Elkinton v. Newman*, 20 Penn. St. 281; *Biddle v. Moore*, 8 id. 161; *Dawson v. Callaway*, 18 Ga. 573; *Skidmore v. Romaine*, 2 Bradf. (N.Y. Surr.) 122; *Ferguson v. Brown*, 1 id. 10. Indeed, unless a party sets up the statute by plea, it is treated as a waiver of the privilege, *Sturges v. Burton*, 8 Ohio St. 215; and this rule is so strong, that the courts refuse to allow the amendment of a defective plea, although the effect is to deny to the defendant this statutory privilege, *Johnson v. Green*, 4 G. & J. (Md.) 381; *Nelson v. Bond*, 1 Gill (Md.), 218; *Reed v. Clarke*, 3 McLean (U. S.), 480.

A grantee may reply to a plea of the statute anything which his grantor might have replied. *Ford v. Langee*, 4 Ohio St. 464.

² *Elkinton v. Newman*, 20 Penn. St. 281.

³ *Maddox v. Allen*, 1 Met. (Ky.) 495; *Herndon v. Pratt*, 6 Jones Eq. (N. C.) 327; *Prescott v. Hubbell*, 1 Hill (S. C.) Ch. 210.

⁴ *Peek v. Wheaton*, M. & Y. (Tenn.) 353.

⁵ *Mitcheltree v. Veach*, 31 Penn. St. 455.

In *Maples v. Mackey*, 89 N. Y. 146, it was held that where a judgment by de-

person who can be said to stand in the place and stead of the person for whose benefit the statute inures; ¹ but a mere stranger to the claim, as a creditor of such person, although he may be injuriously affected by his debtor's failure to set up the statute, cannot either set it up himself, or compel his debtor to do so, as in such cases the privilege is personal, and one which the debtor may avail himself of or not, at his election. He may, by contract, waive his right to set up the statutory bar, and in that case the statute is quieted up to, and begins to run afresh from, the time when the contract or agreement was entered into; but while he may by a positive act, as by an agreement not to set up the statute, deprive himself of its benefits, yet he cannot be prevented from relying upon it at law by any merely equitable estoppel.²

The rule that the statute of limitations is a personal privilege, and can only be availed of by the person in whose favor it exists, is illustrated by a case recently decided by the Supreme Court of the United States.³

In that case it appeared that on Dec. 6, 1869, one Nightengale,

fault, of a court of general jurisdiction, recites that the summons was personally served upon defendant, the recital is sufficient to show that the court acquired jurisdiction, and a defect in the proof of service attached to the judgment-roll does not show want of jurisdiction, or affect the validity of the judgment. All intentions are in favor of the validity of the judgment, until want of jurisdiction is affirmatively shown; and upon motion made to vacate a judgment because of informality of the proof of service of the summons, the informality may be cured by amendment.

The statute of limitations is not a defence to a proceeding under the code to make a judgment, recovered against one or more of several persons jointly indebted upon a contract, binding upon one not originally served with the summons, *unless such defence existed at the time the action was commenced*. The action was commenced by service of summons on the joint-contractor, and the proceeding was not a new action but a proceeding at the foot of the judgment.

The provision of the code giving to the one sought to be charged by such proceeding the right to set up any defence which may have arisen subsequent to the judgment, places him in as good a position as though judgment had not been entered, but in no better.

¹ Maddox v. Allen, *ante*; Grattan v. Wiggins, *ante*.

² Bank of Hartford County v. Waterman, 26 Conn. 324. In this case STORRS, C. J., says: "Strong equitable considerations in favor of the present plaintiffs seem to grow out of the fact that they were actually betrayed into ignorance of their rights by the wrongful acts of the defendant himself; that they were misled by the very record to which they might and should rightfully refer for knowledge of their rights, and of which the defendant was himself the author, having verified it under his official oath. It is palpably unjust for the defendant to set up the statute as a defence under such circumstances; to do so is in one sense taking advantage of his own wrong. Yet it is difficult to see that he is not, by the clear provisions of the statute itself, protected in so doing; nor are we aware of any well-established doctrine by which a party, in a court of law, can be prohibited, on the score of equitable estoppel, from defending himself under a public statute, designed to be of universal application in the matter of legal remedies." The defence being personal, only protects the party entitled to its benefits, *Armstrong v. Croft*, 3 Lea (Tenn.), 191. *Davis v. Davis* (Tenn.), *MS*.

³ *Sanger v. Nightengale*, 122 U. S. 176.

who was at that time a resident of Georgia, executed a mortgage to the plaintiff upon certain lands in the State of Georgia to secure the payment of three notes of \$10,000 each, the notes being payable in one, two, and three years, with semi-annual interest. No money was ever paid upon the mortgage either by way of principal or interest. The mortgagor died in April, 1873, and the defendant became executor of his will. There were several mortgages prior to the plaintiff's, all of which were properly recorded and became liens upon the property. One of the prior mortgages was made by Nightengale the mortgagor, on Jan. 30, 1855, and included the property covered by the plaintiff's mortgage as well as a large amount of other lands and considerable personal property. This mortgage had been assigned for the consideration of \$100,000 by the mortgagee to one Molyneux, who afterwards died, and his widow and heirs removed to England. The executor of the estate of Molyneux had taken judgment against Nightengale before his death for the sum due on the bonds secured by the mortgage, and had also foreclosed the mortgage, and the property had been sold, and a deed made by the sheriff under that sale to mortgagor's son, William Nightengale. All this occurred in the lifetime of the mortgagor. The plaintiff in his bill of complaint assailed the proceeding by which the mortgage was foreclosed, and the title of the property came into the hands of William Nightengale, and alleged that it was the result of a fraudulent combination on the part of the mortgagor and William Nightengale, Mrs. Molyneux, and the executor of Molyneux, to defraud him of his just claims after the mortgage of December, 1869. This fraudulent combination was denied by the defendants in their answer, and the plaintiff afterwards filed an amended bill in which he alleged that at the time the suit was instituted for the foreclosure of the mortgage under which William Nightengale acquired title, the debt was barred by the statute of limitations, and that the bonds and mortgage were all past due and barred by the statute, and insisted that the failure of the mortgagor to plead the statute of limitations in bar of the foreclosure proceeding did not and could not affect his right to avail himself of the statute, and asked the court to decree that the said foreclosure proceedings were void by virtue of said statute of limitations against the claim and right of the complainant.

MILLER, J., in delivering the opinion of the court, said: "In the case before us Sanger never had the possession, never had the legal title, and, as he was no party to the foreclosure proceedings, which he now contests, he simply stands upon such rights as his mortgage lien gives him against Nightengale. It is difficult to see from what standpoint he, in this suit, in which he is complainant, seeking to foreclose his own mortgage, can set up the statute of limitation, not as a defence, for he is not sued and nobody is troubling him about his claim, but as a positive weapon to set aside and annul in this collateral proceeding the decree of a court of competent jurisdiction, with proper parties before

it, which foreclosed a mortgage, prior in time and equal in equity to his, under which the property was sold and passed into other hands. Certainly the court which rendered that decree had jurisdiction of the property and of Nightengale, the defendant, who was in possession, and who had the legal title. It is equally as certain that whether Nightengale ought to have pleaded the statute or not, he did not do so, and it is now too late to set it up as a defence to that suit. If Nightengale himself had made that plea, it is difficult to perceive how he could have avoided the effect of part payment by the transfer of Dunginess and an acknowledgment of the debt by the settlement under which it was adjusted at \$51,250, as a sufficient answer to the plea of the statute of limitations. We suppose, though no authorities are cited on the subject, that the law of Georgia, like that of other States, admits of such evidence as payment, acknowledgment of the debt, and agreement to pay, as being a sufficient reply to the statute of limitations. How Nightengale could have pleaded the statute successfully under such circumstances we do not see. In short, we see no way, in accordance with any known principles of dealing with the statute of limitations, that the plaintiff can, in this collateral proceeding, make use of the statute as a positive weapon of attack to set aside a decree rendered by a court of competent jurisdiction, with proper parties before it, under which the title has passed by a judicial sale to third persons."

SEC. 42. Limitations by Contract. — Although not strictly within the purview of this work, it is deemed advisable to say that the parties to a contract may, by an express provision therein, provide another and different period of limitation from that provided by statute, and that such limitation, if reasonable, will be binding and obligatory upon the parties. This species of limitation is more frequently resorted to in insurance contracts, but there can be no sort of question but that it may equally well be extended to any species of contract.¹ The rule is that while the parties to a contract cannot by anything contained therein oust the jurisdiction of the courts, yet they may lawfully contract to limit the time within which an action upon such contract shall be brought, and the limitation so imposed is binding upon the parties.²

¹ In *Gulf, &c. R. R. Co. v. Gatewood*, 79 Tex. 89, this rule was applied to a limitation on a bill of lading.

² *Ames v. New York Ins. Co.*, 14 N. Y. 453; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Williams v. Vermont Mut. Ins. Co.*, 20 Vt. 222; *Wilson v. Aetna Ins. Co.*, 27 id. 99; *Edwards v. Lycoming Ins. Co.*, 75 Penn. St. 378; *Beatty v. Lycoming Ins. Co.*, 66 id. 9; *Brown v. Savannah Ins. Co.*, 24 Ga. 101; *Carter v.*

Humboldt Ins. Co., 12 Iowa, 287; *Davidson v. Phoenix Ins. Co.*, 4 Sawyer (U.S.), 594; *Keim v. Home Ins. Co.*, 42 Mo. 38; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Insurance Co. v. La Croix*, 35 Tex. 263; *Brown v. Hartford Ins. Co.*, 5 R. I. 394; *Portage Co. Ins. Co. v. Stukey*, 18 Ohio, 455; *Roach v. New York & Erie Ins. Co.*, 30 N. Y. 546; *Amesbury v. Bowditch Ins. Co.*, 6 Gray (Mass.), 603; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Goodwin v. Amoskeag Ins. Co.*, 20

Thus the provisions in a policy of insurance in reference to proofs of loss, as well as for enforcing a claim therefor, must be complied with, unless the insurer has done that which amounts to a waiver of compliance; and, in order to amount to a waiver, the insurer must have done that which justified the assured in remaining inactive. The mere pendency of negotiations between the parties, or the fact that occasional interviews have been had between them, in regard to the adjustment of the loss, has been held not to amount to a waiver.¹ The conduct of the insurer must be such as to amount to an agreement, express or implied, to suspend the legal remedies,² or as would operate as a fraud upon the insured. Thus, if an insurance company holds out hopes of an adjustment, and thereby induces delay, it is estopped from setting it up in bar of the action.³

N. H. 73; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 625; *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552. In Maine, by statute, such stipulation in the policy is nugatory, and the policy-holder has two years from the time of loss within which to bring his action. *Doblier v. Agricultural Ins. Co.*, 67 Me. 180.

¹ *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Goodwin v. Amoskeag Ins. Co.*, 20 N. H. 73.

In *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, the defendant issued a policy of fire insurance which limited the time for bringing an action upon it to a "term of twelve months next after the loss or damage shall occur." A loss was not payable under it until sixty days after the proof required by it "shall have been received at the office of the company in New York, and the loss shall have been satisfactorily ascertained and proved." In an action upon the policy, held, that the period of limitation prescribed did not commence to run until a loss became due and payable, and the right to bring an action had accrued; and so, that an action brought within twelve months after the expiration of sixty days from the time of the loss was not barred by the limitation. *Johnson v. H. Ins. Co.*, 91 Ill. 93; 33 Am. Rep. 47; *Fullam v. N. Y. U. Ins. Co.*, 7 Gray (Mass.), 61, disapproved.

In *Donnelly v. City of Brooklyn*, 121 N. Y. 9, under the provision of an act to widen and improve a street in the city of Brooklyn, and the laws then in force in relation to the taking of private property for street purposes, which, by the terms of the act, are made applicable to proceed-

ings under it, an award of damages to a land-owner is binding upon the city, although no assessment for benefits was made or attempted.

Where no assessment has been made, and the making thereof has been unreasonably delayed, the land-owner is entitled to recover the full amount of his award.

An action by the land-owner to recover such amount is not based upon the negligence of the city, and so is not barred by the expiration of six years after the city has permitted a reasonable time to elapse for perfecting its assessment.

The basis of the action is *the taking of the land*, and the negligence of the city is important only in respect to the effect it may have in depriving it of a possible defence that the award was imperfect and not obligatory upon it to its full extent.

Such an award, when confirmed by the court, is a judgment within the meaning of the statute of limitations, the immediate enforcement of which is for a time suspended by the option given to the city, to make payment or reduction by assessment, if made within a reasonable time, and so an action to recover the same is not barred until after the lapse of twenty years.

The time for payment under the law is extended so long as the right to make assessments remains; and the time may be fixed by the land-owner, either by mandamus proceedings, by action, or a formal demand for damages.

² GILCHRIST, J., in *Goodwin v. Amoskeag Ins. Co.*, *ante*.

³ *Grant v. Lexington, &c. Ins. Co.*, 5 Ind. 23.

The condition, being a mere matter of contract, may be waived, either expressly or by implication; and when the insurer, by any act of his, causes the delay, or prevents the bringing of the action within the time, strict compliance is not necessary.¹ Thus, in the case last referred to, the defendant was a foreign corporation, and no agent upon whom process could be served could be found within the time limited, and this was held a sufficient excuse for not bringing the action within the period limited. The assured is not bound to pursue the company in its own domicile, but may wait until process can be served upon it in the State where he resides; and if delay is thus entailed, it is excused, as it is the duty of the insurer, if it means to insist upon the condition to render it possible for the insurer to comply with the condition, to have a known agent, upon whom process may be served, in the State where the insurance is made. So it seems that compliance as to time may be excused when the nature of the loss and the interest of the assured therein is such that its extent or value cannot be determined within the time limited. Thus, it has been held that a condition that an action must be brought within a certain time after the loss will not bar an action, brought after the time had elapsed, upon a policy in which the interest insured was a mechanic's lien, when it was impossible to fix the value of the lien within the prescribed time.²

¹ Peoria Ins. Co. v. Hall, 12 Mich. 202.

² Longhurst v. Star Ins. Co., 19 Iowa, 364. But opposed to this doctrine see Eastern R. R. Co. v. Relief Ins. Co., *ante*, where it was held that a railroad company insured against losses from the destruction of the property of people along its line by sparks, &c., from its engines, which, by the terms of the policy, was required to make proofs in sixty days, could not wait until such claims were adjusted and their amount ascertained.

In Wright v. Mutual Benefit Life Ass. of A., 118 N. Y. 287, affirming 43 Hun, 61, a certificate of membership and insurance upon the life of W., payable to H., issued by the defendant, contained this provision: "No questions as to the validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership and during the life of the member therein named. "The application upon which the certificate was issued, contained an agreement that if any misrepresentation or fraudulent or untrue answer or statement has been made, or if any fact which

should have been stated to the association be suppressed," the agreement shall be void. W. died within the two years. In an action upon the certificate, defendant alleged fraud and false statements in the application; also, that H. had no insurable interest, and that it was a speculative action on his part to secure an advantage to himself on the life of W. Upon the trial the defendant offered evidence to sustain this defence, which was objected to as inadmissible under the said provision of the certificate and excluded. It was held no error, as under the provision quoted no such defence was available after the death of the insured; that the stipulation was within the power of the parties to make, and was in the nature of and served a similar purpose to the statute of limitations and repose; that it was not a stipulation absolute to waive all defences and to condone fraud, but provided ample time and opportunity within which they may be, but beyond which they may not be set up.

Also that the plaintiff, who claimed as assignee of H., was entitled to recover the whole amount provided by the policy, although the debt owing the payee by the insured, to secure which the insurance had

Thus, in a New York case,¹ by the terms of the policy losses were to be paid within ninety days after proofs should be completed and filed, and a suit not commenced within six months after the loss was to be barred. The loss occurred July 5, and proofs of loss were duly filed, but being defective, the company suggested the defects, and amended proofs were filed seven days afterwards (October 14), and it was then stated by the secretary, in a letter to the assured, that the loss would be paid January 15, and, in consequence of this statement, an action was not brought until after the lapse of six months. The loss not being paid January 14, an action was brought, and the company set up the breach of the condition of the policy as to the time of bringing an action thereon in defence. The court held that, by the letter of the secretary promising to pay January 14, the stipulation was suspended and strict compliance waived. It is more than likely that the action would have been upheld upon the promise to pay, as a new contract, and in such cases it is often expedient to declare upon the policy, and also upon the promise to pay, if there has been one.²

A condition that no suit shall be sustainable unless commenced within six months after a loss occurs, and also that the payment of losses shall be made in sixty days from the date of the adjustment of preliminary proofs of loss by the parties, must be so construed as not to conflict unnecessarily with each other; and where the parties, in good faith, and without any objection that unnecessary time is taken for the purpose, are occupied so long in adjusting proofs that sixty days from the date of adjustment does not expire within the six months, the policy does not become forfeited merely because the suit is not brought within six months and before the loss is payable. An action brought promptly upon the expiration of sixty days from the adjustment of loss is not barred because commenced more than six months after the loss occurred. Where objections are made by the insurers to the preliminary proofs of loss, the sixty days are not to be deemed to commence until after a reasonable time for the insured to examine the objections.³

been made payable to H., was less than the sum insured, or had been paid in the lifetime of the latter, or although a portion of the sum provided by the policy was designed by the payee, in a contingency, for the benefit of some other person.

¹ *Ames v. New York Union Ins. Co.*, 14 N. Y. 253.

² *Amesbury v. Mutual Fire Ins. Co.*, 6 Gray (Mass.), 596.

³ *New York v. Hamilton, &c. Ins. Co.*, 10 Bosw. (N. Y.) 537.

In *Cooper v. U. S. M. B. A.*, 132 N. Y. 384, 57 Hun, 407, the defendant issued a certificate of insurance by which it under-

took to insure C. against personal bodily injury; in case death resulted from such injuries within ninety days, defendant agreed to pay to plaintiff, the wife of C., \$5,000. The certificate provided that no suit should be brought to recover "any sum under the insurance unless the same is commenced within one year from the time of the alleged accidental injury." C. received an injury Dec. 10, 1887, which resulted in his death Jan. 2, 1888. This action was commenced Dec. 29, 1888. Held, that so far as the plaintiff was concerned, the action was to be commenced within one year after the

Where the policy stipulates or the charter of the company provides that, unless the insured is satisfied with the decision of the company in reference to the settlement of the loss, action shall be brought in the next court to be held in the county, if one is to be held within sixty days, otherwise before the next court, the condition must be complied with, or the insurer is relieved from liability.¹ And the same is true where any condition as to the time of bringing an action upon the policy is violated.²

SEC. 43. Effect of War upon Conditions. — Where, by the policy, right to sue on it ceased within twelve months after loss, and the plaintiff was prevented from suing by reason of the war, and did not actually sue until more than twelve months after loss, exclusive of the time of the war, it was held that, although the statute of limitations is capable of enlargement to accommodate a precise number of days of disability, yet the contract in a policy of insurance is not; and that this clause of the contract is rebutted by the state of war, and is not presumed to revive when the war ceases.³

SEC. 44. Premature Actions. — Where the policy provides that the loss shall be payable within sixty days, ninety days, or any other period

injury to her, which was the death of her husband, and the action having been commenced within a year therefrom, this action could be maintained.

King v. Watertown F. Ins. Co., 47 Hun, 1, distinguished.

¹ *Portage Ins. Co. v. West*, 6 Ohio St. 599; *Dutton v. Insurance Co.*, 17 Vt. 369. One of the conditions of a policy provided that no suit should be begun more than six months after any loss or damage. A subsequent condition provided that payment of losses should be made in sixty days after the adjustment of the preliminary proofs of loss. It was held that these two provisions should be construed together, and that the six months did not begin to run until the expiration of the sixty days. *Mayor of New York v. Hamilton, &c. Ins. Co.*, 39 N. Y. 45. The policy contained a condition that a party dissatisfied with the refusal of the company to pay the insurance should bring an action at the next term of court to be held in the county, unless such court should sit within sixty days after the refusal to pay, and in that case at the next term after the sixty days; and, unless suit was so brought, all claim under the policy should be forfeited. It was held that an insured who failed to bring his action at the first term, held

more than sixty days after the refusal to pay the insurance, was precluded from subsequently maintaining his action. *Keim v. Home, &c. Ins. Co.*, 42 Mo. 38. By the terms of a policy, the insurers, in case of loss, were allowed sixty days in which to pay the loss. It was held that a general denial of any liability on the part of the company enabled the insured to bring an action at once. *Norwich, &c. Trans. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561. An insurance policy stipulated that the company should not be liable to pay until after the sixty days from the loss. Pending these sixty days a petition was filed. It was held that the irregularity could be cured by a supplemental petition. The want of validity in the notice upon the agent of an insurance company is waived by their subsequent appearance and pleading. *Franklin Ins. Co. v. McCrea*, 4 Iowa, 229.

² *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Roach v. New York Ins. Co.*, id. 546; *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97.

³ *Semmes v. City Fire Ins. Co.*, 13 Wall. (U. S.) 158; *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424. See *Glass v. Walker*, 66 Mo. 82.

after proof of loss is made, an action brought inside of the period limited is premature.¹

SEC. 45. When Adjustment is essential. — When the policy provides that, if the assured is not satisfied with the adjustment of the loss by the insurer, action must be brought within a certain time, the insurer is not bound to bring his action except within that time after the loss is adjusted.²

SEC. 46. Effect of Appointment of Receiver. — Where the company is dissolved, and its property placed in the hands of a receiver, the limitation is dispensed with, as every person insured in the company is treated as a party to the suit for the winding up of the company, although not named as a party thereto.³

SEC. 47. Parol Contracts. — Where the contract rests in parol, and no policy is issued, the conditions of the policies of the company do not apply. Thus, where the assured took a binding receipt from the insurer's agent, and paid the premium, conditioned that a policy should be issued within twenty-one days, or the money be refunded, and thirty-three days thereafter, no policy having been issued, and the premium not refunded, and the company refused to make one, it was held that a condition of the policies issued by the company, requiring actions for losses to be brought within six months, did not apply, for the reason that the action was not founded on the policy, but upon the contract to insure.⁴

SEC. 48. Commencement of Action, What is. — An action is deemed to be commenced when the summons or writ is issued; consequently, if an action is commenced within the time limited, the assured's rights are preserved, even though, by reasonable diligence, the assured fails to obtain service thereof upon the insurer. In a Michigan case⁵ this question was directly passed upon, and as the facts relating to this point, as well as the rule applicable in such cases, are embraced in the opinion of CHRISTIANCY, J., I give that portion of it relating to this question. He said: "It was objected by the defendant below that the action was not brought within the period of twelve months after the loss, according to the seventeenth condition attached to the policy. It appears from the bill of exceptions that a summons was issued in the cause March 18, 1861 (thirteen days before the expiration of the twelve months), returnable on the second day of April, 1861; that on

¹ *Cumberling v. McCall*, 2 Dall. (Penn.) 280; *Davis v. Davis*, 49 Me. 282; *Kimball v. Hamilton Fire Ins. Co.*, 8 Bosw. (N. Y.) 495. Where the policy provides that no action shall be brought within twelve months, or any other period after the loss, an action brought before the period named has elapsed will be dismissed. *Riddlesberger v. Hartford Fire Ins. Co.*, 7 Wall. (U. S.) 386.

² *Landis v. Home Mut. Ins. Co.*, 50 Mo. 591.

³ *Pennell v. Chandler*, 7 Chicago Leg. News, 227.

⁴ *Penly v. Beacon Ins. Co.*, 7 Grant's Ch. (Ont.) 130; *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 467; *Hirsch v. Adams* (Tex.), 16 S. W. 790.

⁵ *Peoria Fire & Mar. Ins. Co. v. Hall*, 12 Mich. 202; 4 Ben. F. I. C. 737.

the third day of April, 1861, the sheriff made a return upon the said summons that defendant could not be found in his bailiwick; that on the next day another summons was issued, with which defendant was served, nothing appearing on this summons showing it to be a continuation of the first, except the word 'alias,' written by the clerk upon the face of the seal.

“ We do not deem it necessary to discuss the question whether this second summons, as an 'alias,' operated strictly as a continuation of the first, so as to save a right of action against a statute of limitations which had run upon it in the mean time; nor do we think it necessary to determine the validity of this species of limitation by contract. If valid at all, it was valid as a contract, and not as a statute. A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse for delay beyond the period fixed, unless such excuse be recognized by the statute itself. But a limitation by contract (if valid) must, upon the principles governing contracts, be more flexible in its nature, and liable to be defeated or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period. The plaintiff had the whole of the twelve months in which to bring his suit; and it was as competent for him to institute it on the last as the first, or any intervening day. And the fundamental idea, the tacit condition upon which such a limitation must rest, and without which it could not be tolerated for a moment, is, that the defendant should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close, to enable the plaintiff to commence his suit against him, by the service of process in the ordinary legal mode; otherwise, the defendant would be enabled to take advantage of his own wrong, and, by absenting himself entirely, to defeat the plaintiff's right of action.

“ The defendant in the present case was a foreign corporation, doing insurance business in this State. By the act of Feb. 15, 1859, full provision was made for bringing the action within the State; and the company, before doing any business in the State, was required to file, in the office of the Secretary of State, a resolution consenting that service of process may be made upon any agent of the company. Nothing is said in the case upon what agent the service of the second summons was made; but it must have been made upon some agent of the company. It does not appear whether there was an agent in the county of Jackson, or in any other particular county. It appears that S. S. Brown was the general agent of the company for this State, and that Knight was also an agent; but neither their residence nor place of business is stated. From anything which appears in the case, the plaintiff was as much at liberty to bring his action in Jackson as in any other county, so far as the residence of an agent could have any bearing, if, indeed, it could have any under the law; and if an agent

of the company resided in Jackson County, the action was certainly very properly brought there.

“ All that was necessary for the plaintiff to do, to excuse the delay beyond the twelve months, was to take the proper and usual means for instituting his suit and getting service of process within the limited period, which he did by issuing a summons thirteen days before the expiration of that period, returnable two days after it had expired. The return shows that no service could be had during that time. We can see no possible ground for imputing any want of good faith to the plaintiff in his endeavor to get the process served in time. Upon the facts stated in the case, therefore, it appears to have been the fault of the defendant — the absence of the agent — that the first summons was not served and the action commenced within twelve months; and this is sufficient to defeat the limitation or extend it till the service was made under the second summons, which was issued immediately on the return of the first.”

It is held, however, in Vermont, that, where an action is commenced within the period limited, but for any reason the plaintiff is compelled to become nonsuit, or the action fails, a new action, commenced after the limitation has expired, will be defeated by the limitation in the policy.¹ In a New York case² it was held that the fact that within twelve months after the loss an injunction had been issued against the policy-holders, restraining them from receiving the payment for losses, and against the company from paying the same, was not sufficient to excuse the plaintiff from bringing the action within the time limited. In a case in Ohio, involving similar questions, the doctrine of the Vermont case is repudiated,³ and it was held that, where a suit is commenced within the time, but which is dismissed, or for any cause is not carried to final judgment, another action may be brought, although the limitation has expired. But, in analogy to the rule adopted under statutes of limitation, the decision in the Vermont case would seem to be sound.

SEC. 49. Delay induced by Defendant. — Where the insurer or its agent does or says anything to warrant the assured in believing that his claim will be settled, and which induces him to delay bringing an action within the time limited, the insurer cannot allege a breach in that respect.⁴ But the circumstances must have been such as fairly to induce delay, and as would operate as a fraud upon the part of the insurer to set up such delay in avoidance of liability.⁵ Forfeitures are

¹ *Wilson v. Aetna Ins. Co.*, 27 Vt. 99.

² *Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. 499.

³ *Madison Ins. Co. v. Fellows*, 1 Dis. (Ohio Sup. Ct. of Cin.) 217.

⁴ *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Curtis v. Home Ins. Co.*, 1

Biss. (U. S.) 485; *Brady v. Western Ass. Co.*, 17 U. C. (C. P.) 597; *Ripley v. Astor Ins. Co.*, 17 How. Pr. (N. Y.) 444; *Cour-sin v. Penn. Ins. Co.*, 46 Penn. St. 328; *Home Ins. Co. v. Meyer*, 93 Ill. 271; *Derrick v. Lamar Ins. Co.*, 74 id. 404.

⁵ *Brady v. Western Ass. Co.*, *ante*.

not favored by the law, and slight evidence of a waiver will be deemed sufficient.¹

When the insurer adjusts the loss, and promises to pay it within a specified time, the period covered by the promise is excluded from the limitation. Thus, where a loss occurred Oct. 17, 1869, and was adjusted Nov. 6, 1869, and the insurer agreed to pay it on or before Feb. 6, 1870, and the action was not brought until Nov. 7, 1870, it was held that it was brought in time, as the period of time between Nov. 6, 1869, and Feb. 6, 1870, must be excluded from the limitation.² So where the insurer or its agent has induced the assured to delay bringing an action, if the circumstances are such as fairly warranted the delay, it will be excused. Thus, where the insurer's general agent objected generally to the proofs of loss, and wrote the assured that he would call upon him, and the assured having waited five months without hearing from or seeing the agent, wrote him, and then was for the first time informed that the insurers would insist upon a strict compliance with the conditions of the policy as to proofs of loss, and the assured within four months afterwards made his proofs and sent them to the insurer, it was held that the five months during which the insurer had delayed the making of corrected proofs must be excluded from the limitation, and an action brought within one year from the time when he was informed that strict compliance as to proofs was required, was seasonable.³

SEC. 50. *When Claim is regarded as arising.*—When a policy stipulates that no action shall be brought unless commenced within twelve months after loss or damage shall accrue, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of loss have been served, it has been held in New York that the limitation does not attach until after the period which the company has in which to pay the loss has expired.⁴ The limitation cannot apply until a right of action has accrued, and until the period which the company has to pay the loss in has expired no right of action exists.⁵ But, under a similar policy, it has been held in Illinois⁶ that the action must be brought within the period stipulated, dating from the time of loss, and that an action brought within twelve months from the expiration of sixty days after loss, but not within twelve months from the time of loss, was too late.

¹ *Ripley v. Astor Ins. Co., ante.*

² *Black v. Winnesheik Ins. Co., 31 Wis. 472.*

³ *Killip v. Putnam Ins. Co., 28 Wis. 47.* See also, similar in its facts and doctrine, *Ames v. New York Central Ins. Co., 14 N. Y. 253*; *Mayor of New York v. Hamilton Ins. Co., 39 id. 45.*

⁴ *Mayor of New York v. Hamilton Ins.*

Co., 39 N. Y. 45; *Mix v. Andes Ins. Co., 9 Hun (N. Y.), 397.*

⁵ *Barbec v. Fire & Mar. Ins. Co. of Wheeling, 16 W. Va. 64.*

⁶ *Johnson v. Humboldt Ins. Co., 91 Ill. 92.*

SEC. 51. Waiver of Limitation. — The forfeiture arising under the limitation clause may be waived by the company, and a waiver may be found from the fact that, after the time within which the action should have been brought, the company acted and promised as if it did not intend to rely upon the limitation,¹ or from its conduct before the limitation has expired, which fairly induces a confidence that the loss will be paid without action, as the fact that negotiations for a settlement are pending, and other facts and circumstances calculated to induce delay.²

It is in all cases essential, in order that contracts of limitation may be binding, that they shall be reasonable, and afford the parties a reasonable opportunity to enforce their claim. Thus, a stipulation in a bill of lading that all claims for damages for injuries to or loss of property against the carrier shall be adjusted before the goods leave the office, or claim made therefor to a "trace agent" within thirty days after shipment, has been held unreasonable and void.³ The question of reasonableness, however, is one largely dependent upon the circumstances of each case, and the doctrine of the cases cited cannot be said to be well sustained as embodying an unqualified or absolute rule of law. Thus, in an English case⁴ there was a stipulation that "no claim for deficiency, damage, or detention would be allowed unless made within three days after the delivery of the goods, nor for their loss unless made within seven days from the time when they should have been delivered," and the condition was held reasonable. In determining the question of reasonableness when the limitation dates from the date of the bill of lading, the length of time ordinarily required for transportation from the place of shipment to the place of consignment must be regarded,⁵ and also the peculiar difficulties of transportation between the points in question, if any such existed at the time when the contract was entered into;⁶ and if, in view of all the circumstances,

¹ *Coursin v. Penn. Ins. Co.*, 46 Penn. St. 323.

² *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Ripley v. Astor Ins. Co.*, 17 How. Pr. (N. Y.) 444; *Curtis v. Home Ins. Co.*, 1 Biss. (U. S. C. C.) 485; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Merchants' Mut. Ins. Co. v. La Croix*, 45 Tex. 158.

³ *Capehart v. Seaboard, &c. R. R. Co.*, 81 N. C. 438; *Adams Ex. Co. v. Reagan*, 29 Ind. 21; *Place v. Union Ex. Co.*, 2 Hilt. (N. Y. C. P.) 19; *Southern Ex. Co. v. Caperton*, 44 Ala. 101.

⁴ *Lewis v. Great Western Railway Co.*, 5 H. & N. 867.

⁵ *Southern Ex. Co. v. Hunnicutt*, 54 Miss. 566; *United States Ex. Co. v. Harris*, 51 Ind. 127.

⁶ *Adams Ex. Co. v. Reagan*, 29 Ind. 21. In this case the shipment was made from Clayton, Ind., to Savannah, Ga., at a time when the country was in a very unsettled condition, and the difficulties of transportation between those points very great. The court held that in view of this condition of things the limitation was unreasonable, because it put it within the power of the carrier, by a delay which would not perhaps be unreasonable, to prevent any claim by the shipper for loss or damage. See *United States Ex. Co. v. Harris*, 51 Ind. 127, where such a condition was upheld in a case where none of the objections stated in the first-named case existed.

the condition is not unreasonable, it will be upheld and given effect to.¹ "Such conditions," says POLLOCK, C. B.,² "are perfectly reasonable. The law allows persons to make their own bargains in matters of this sort," with the single condition that the stipulation shall not be unreasonable.

SEC. 52. **Against whom Statute may be enforced. State.**—Except the statute otherwise expressly provides, it cannot be set up as a bar to any right or claim of the State;³ thus, it does not apply to actions in

¹ *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Weir v. Express Co.*, 5 Phila. 355; *Southern Ex. Co. v. Hunnicutt*, *ante*; also *S. P. Wolf v. Western Union Tel. Co.*, 62 Penn. St. 88, where a stipulation in a contract by a telegraph company, that they would not be liable for damages in any case unless the claim was made within sixty days from the time of sending the message, was held reasonable and valid.

² *Lewis v. Great Western R. R. Co.*, *ante*.

³ *State v. Joiner*, 23 Miss. 500; *Henlock v. Johnson*, 1 Tr. Con. (S. C.) 135; *McKeehan v. Com.*, 3 Penn. St. 151; *Brinsfield v. Carter*, 2 Ga. 143; *Wright v. Swan*, 6 Port. (Ala.) 84; *State v. Fleming*, 19 Mo. 607; *Hardin v. Taylor*, 4 T. B. Mon. (Ky.) 516; *Wilson v. Hudson*, 8 Yerg. (Tenn.) 398; *Josselyn v. Stone*, 28 Miss. 763; *Stoughton v. Baker*, 4 Mass. 526; *Havlock v. Jackson*, 8 Brev. (S. C.) 254; *Com. v. Hutchinson*, 10 Penn. St. 466; *Ware v. Greene*, 37 Ala. 494; *Swearingen v. United States*, 11 G. & J. (Md.) 373; *Hotman v. May*, 33 Penn. St. 455; *Bayley v. Wallace*, 16 S. & R. (Penn.) 245; *Com. v. Johnson*, 6 Penn. St. 186; *Parks v. State*, 7 Mo. 194; *Parmalee v. M'Nutt*, 9 Miss. 179; *Blodsoe v. Doe*, 5 id. 13; *Levasser v. Washburn*, 11 Gratt. (Va.) 572; *Des Moines v. Harker*, 34 Iowa, 84; *Gore v. Lawson*, 6 Leigh (Va.), 258; *Kennedy v. Laconley*, 16 Ala. 239; *Lindsey v. Miller*, 6 Pet. (U. S.) 666; *Wallace v. Miner*, 6 Ohio, 366; *State v. Arledge*, 2 Bailey (S. C.), 401; *Com. v. Baldwin*, 1 Watts (Penn.), 54; *Weatherhead v. Bledsoe*, 2 Overt. (Tenn.) 352; *Munshower v. Patton*, 10 S. & R. (Penn.) 54; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *State Treasurer v. Weeks*, 4 Vt. 215; *Stoughton v. Baker*, 5 Mass. 522; *Nimma*

v. Com., 4 H. & M. (Va.) 57. And in controversies between States as to the settlement of their boundaries, the statute of limitations is not applied in all its rigor, nor will title by prescription be acquired as readily. *Rhode Island v. Massachusetts*, 15 Pet. (U. S.) 233. In England, formerly the rule was that, except where it is expressly named, the crown is not affected by the statutes of limitation, and the old common-law maxim, *nullum tempus occurrit regi*, prevailed. And the same is the rule in this country with regard to the rights of the government, except in two or three States where the statute otherwise provides. The first attempt to limit the rights of the crown in England was by Stat. 21 James 1, c. 5, entitled "An Act for the general quiet of the subject against all pretences of concealment whatsoever;" but inasmuch as that act only gave protection where there had been possession adverse to the crown for sixty years previously to the passing of the act, it became of course, by efflux of time, continually less useful. It has, however, been doubted whether the Stat. 3 & 4 Wm. IV. c. 27, may not apply to the crown, and the *nullum tempus* act apply only to the private property of the crown; but there is an express dictum of ROMILLY, M. R., to the contrary in *Attorney-General v. Magdalen College*, 18 Beav. 246. A more effectual remedy was provided by the *nullum tempus* act, passed in the reign of George the Third. 9 Geo. III. c. 16. This act is amended by the Stat. 24 & 25 Vict. c. 62. See Appendix. By this the right of the crown to recover any manors, lands, tenements, rents, tithes, or other hereditaments other than liberties and franchises, is barred after the lapse of sixty years from the commencement of such right. And there are pro-

favor of the State against sureties upon bonds given for the faithful dis-

visions for the case of reversions and other future interests belonging to the crown. Some time subsequently a very similar act was passed for Ireland. 48 Geo. III. c. 47. By later special acts, 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; and 24 & 25 Vict. c. 62, provisions similar to those contained in the *nullum tempus* act have been made in regard to the Duchy of Cornwall. It will be observed that the words in Stat. 9 Geo. III. c. 16, are very general; but it has been doubted whether, and to what extent, they include advowsons, chattels real, and mines, and the exact nature of liberties and franchises there referred to. With regard to crown advowsons, it has been argued that they are within the *nullum tempus* act, as being included in the term "all hereditaments" contained in it; and also because in the ninth section of the same act there is an express reservation of the crown rights in the advowsons of the Savoy. On the other hand, it has been contended that the act in question varied the crown rights only when the subject of the claim had not been "put in charge," a mode of expression not applicable to advowsons. *Gibson v. Clarke*, 1 Jac. & W. 159. In the act of 9 Geo. III. there were certain exceptions in favor of the crown in cases where the title of the crown had been acknowledged, by reason that the manor or other hereditaments had been in charge to the crown or stood *insuper* of record, and also where as to a different part of the manor or other hereditaments in question the crown's right had been preserved. These exceptions have been abolished by a recent act, and provision is made by the same act that, where the crown has made a lease of any manor or other hereditament, the right of the crown against any person whose possession commences subsequently to the lease shall not be considered to accrue till the expiration of the lease. 24 & 25 Vict. c. 62, §§ 1, 3. It has been said that the remedy only of the crown is barred by the *nullum tempus* act, and that the title is not transferred; and words of LORD ELLENBOROUGH, in a case of *Goodtitle v. Baldwin*, 11 East, 488, have been supposed (but

perhaps without sufficient reason) to support this view. 9 Geo. III. c. 16. The privilege of the crown has been extended to a lessee of the crown out of possession more than twenty years. *Doe v. Roberts*, 13 M. & W. 520. But see *Lee v. Norris*, Cro. Eliz. 331. Although the government is not affected prejudicially by any particular statute of limitation, it may yet take the advantage of it. 11 Coke, 68 b. But see *Rustomjee v. The Queen*, L. R. 1 Q. B. D. 487. Independently of the statute, a grant from the government may be presumed where the grant would not have been in excess of the prerogative. In *Goodtitle v. Baldwin*, 11 East, 488 (see *Mayor of Hull v. Horner*, 1 Cowp. 102), ELLENBOROUGH, C. J., remarked that it was the daily practice of the courts to presume a grant of markets and the like upon an uninterrupted enjoyment of twenty years. No grant can be presumed to have been made by the government against the express provisions of any statute. *Goodtitle v. Baldwin*, 11 East, 488; *Devine v. Wilson*, 10 Moore, 502. In all cases where not specially named the government is not affected by statutes of limitation, consequently there is no limit to the time for the recovery of government debts. Though between the State and its immediate debtor the statutes have no application, *The King v. Morrall*, 6 Price, 24, yet when it takes as assignee the rights of a subject, through a forfeiture or otherwise, there is more difficulty in the question. It seems that where it has a derivative title it stands in the same position as its principal. *Lambert v. Taylor*, 4 B. & C. 138; *United States v. Burford*, 3 Pet. (U. S.) 30. Thus, it has been considered that where the debt to the principal is already barred, the transfer to the State will not revive it; but if time is running against the principal, it is held in England that time will cease to run on the debt becoming vested in the government, *Lambert v. Taylor*, *ante*; but in this country the rule is otherwise, and if the statute has commenced to run upon the debt before its assignment to the State, it is held that its operation is not stopped by such transfer, *United*

charge of the duties of public officers,¹ or other official bonds;² nor to actions to recover debts due to the State,³ or to recover lands belonging to it;⁴ nor, indeed, to any class of claims in favor of the State, unless the statute expressly so provides. But this rule only applies to claims in which the State is the real party, and has no application in cases where, although a nominal party to the record, it has no real interest in the litigation, but its name is used to enforce a right which inures solely to the benefit of an individual or a corporation, municipal or otherwise.⁵ No laches are imputable to the State, consequently no

States v. White, 2 Hill (N. Y.), 59. A debt due to a bank owned and run by the State alone is not barred by the statute, *State Bank v. Brown*, 2 Ill. 106; but where the government becomes associated with an individual or corporation in an enterprise, the government to that extent divests itself of the prerogatives of sovereignty and assumes the character of a private citizen. *United States Bank v. McKenzie*, 2 Brock. (U. S. C. C.) 393.

¹ *Ware v. Greene*, 37 Ala. 494.

² *State v. Pratt*, 8 Mo. 286.

³ *State Bank v. Brown*, 2 Ill. 106.

⁴ Thirty years' possession will not give title against the State. *Walls v. McGee*, 4 Harr. (Del.) 108. The statute does not run against a tenant in possession while the title is in the State. *Smead v. Williams*, 6 Ga. 158; *City of Alton v. Illinois Trans., &c. Co.*, 12 Ill. 88. Possession of lands the title of which is in the State, even if adverse and exclusive in its nature, does not operate to disseise or limit the State, or confer any title to the land. *Cary v. Whitney*, 46 Me. 516.

⁵ *Miller v. State*, 38 Ala. 600; *U. S. v. Des Moines Nav. Co.*, 142 U. S. 510. Thus, where a person seeks to enforce his private rights by a mandamus in the name of the State, it has been held that the fact that the right sought to be enforced was barred by the statute was a good defence. *Moody v. Fleming*, 4 Ga. 115.

United States v. Beebe, 127 U. S. 121, the court said: "The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce

a public right or to assert a public interest, is established past all controversy or doubt. *U. S. v. Nashville, C. & St. L. R. R. Co.*, 118 U. S. 125 (30:83), and cases there cited. But this case stands upon a different footing, and presents a different question. The question is, Are these defences available to the defendant in a case where the government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person?

It has not been unusual for this court, for the purposes of justice, to determine the real parties to a suit by reference not merely to the names in which it is brought, but to the facts of the case as they appear on the record. Thus, in the case decided at this term, *Re Ayers*, 123 U. S. 492, 493 (31:225), the court held that the State of Virginia, though not named as a party defendant, was the actual party in the controversy. MR. JUSTICE MATTHEWS, who delivered the opinion said: "It is, therefore, not conclusive of the principal question in this case, that the State of Virginia is not named as a party defendant. Whether it is the actual party . . . must be determined by a consideration of the nature of the case as presented on the whole record." So in the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76 (27:656), the court looked behind and through the nominal parties on the record to ascertain who were the real parties to the suit. CHIEF JUSTICE WAITE, in delivering the opinion of the court, used the following language: "No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt,

length of possession of its lands will bar its title thereto. In a Massa-

that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons. . . . The bill, although signed by the Attorney General, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bond-holders in Louisiana, and it is manifested in many ways that both the State and the Attorney General are *only nominal actors in the proceeding*. The bond-owner, whoever he may be, was the promoter and manager of the suit. . . . And while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether for them."

In the case of *United States v. Nashville, C. & St. L. R. R. Co.*, *supra*, in which it was decided that the statute of limitations of the State of Tennessee was no defence to an action of the United States upon certain negotiable bonds held by them for public use, MR. JUSTICE GRAY is careful to say: "This case does not present the question what effect the statute may have in an action on a contract in which the United States have nothing but the formal title, and the whole interest belongs to others;" and cites *Maryland v. Baldwin*, 112 U. S. 400 (28:822); *Miller v. State*, 38 Ala. 600.

In *State v. County of Kings*, 125 N. Y. 312, it was held, that where a county has neglected to pay its equal proportion of the State taxes, the duty rests upon the State government to adopt the necessary means to compel the performance of this duty, irrespective of the time which has elapsed since the neglect occurred. The power of the legislature to levy taxes is unlimited by the Constitution, and no laches or statute of limitations can bar it from the exercise of that power when justice or equity requires it.

In the former case, it was held that a suit in the name of a State for the benefit of parties interested, is to be regarded as a suit in the name of the party for whose benefit it is brought. MR. JUSTICE FIELD, delivering the opinion of the court, said: "The name of the State is used from ne-

cessity when a suit on the bond is prosecuted for the benefit of a person interested, and in such cases the real controversy is between him and the obligors on the bond;" and the case was decided upon a consideration of the merits as if the party interested was alone named as plaintiff. And he cited, approvingly, the following language in *McNutt v. Bland*, 43 U. S. 2 How. 9. "As the instrument of the State law, his (the governor's) is in the bond and to the suit upon it; but in no just view . . . can he be considered a litigant party. Both look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law."

In *Miller v. State*, the other case cited by MR. JUSTICE GRAY, the court said: "As laches is not to be imputed to the government, the statute of limitations does not apply to the State unless it be clear from the act that it was intended to include the State. . . . In our opinion, the rule that the statute of limitations does not run against the State, has no application to a case like the present, when the State, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third party, who alone will enjoy the benefits of a recovery."

In *Moody v. Fleming*, 4 Ga. 115, 118, which was a case where a party was applying for a mandamus in the name of the State, the court said: "It is insisted that here the State is a party, moving the contest, and setting up a right to have this survey certified, and that the tenant will not be protected by his possession, because the statute of limitations does not run against the State. We have decided, and the decision is sustained by unbroken masses of authority, that the statute of limitations does not run against the State. The answer, however, to this argument is this: The State of Georgia is not the real party to the proceeding. . . . The process is in the name of the State, but the right asserted is a private right; the issue is between two of the citizens of the State."

chusetts case,¹ a question arose on an ancient grant, made in 1634,

Applying these principles to this case, an inspection of the record shows that the government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied. The bill itself was filed in the name of the United States, and signed by the Attorney General, on the petition of private individuals; and the right asserted is a private right, which might have been asserted without the intervention of the United States at all.

In his letter to the United States District Attorney upon the subject, the Attorney General directs that the officer shall sign his (the Attorney General's) name to the bill when the attorneys for the petitioners shall present such a bill, and file the same in the proper court; and that after the suit is commenced these attorneys for the petitioners will have the management of the case. Accordingly the subsequent proceedings in the case have been conducted exclusively by these attorneys, who, in the pleadings, describe themselves as attorneys for the petitioners and beneficiaries of the suit.

We are of the opinion that when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through whom one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other

party, nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants.

These principles, so far as they relate to general statutes of limitation, the laches of a party, and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the decisions of this court. According to these decisions, courts of equity in general recognize and give effect to the statute of limitations as a defence to an equitable right, when at law it would have been properly pleaded as a bar to a legal right. They refuse to interfere to give relief when there has been gross negligence in prosecuting a claim, or where the lapse of time has been so long as to afford a clear presumption that the witnesses to the original transaction are dead, and the other means of proof have disappeared.

In *Gates v. State of New York*, 128 N. Y. 221, it was held that the State in submitting itself to the jurisdiction of a tribunal, with respect to claims against it for damages sustained by reason of any accident occurring on its canals, or connected with their care and management, subjected the determination of its liability to the government of those rules which usually obtain in similar cases.

In that case the plaintiff claimed damages for injuries arising from the overflow of his lands caused by a permanent dam, constructed under the act of 1864. The dam was completed August 31, 1866, and the claim presented March 29, 1871. It was held that the overflow of the plaintiff's lands was the taking of a permanent easement by the State, and fell directly within the law of 1830; that the land was appropriated when the dam was completed and the water of the river raised, and the neglect to present the claim within a year thereafter was held to amount to a waiver of all right of damages against the State.

In *Folts v. State of New York*, 118

¹ *Stoughton v. Baker*, 4 Mass. 526.

containing an implied limitation. The defendant insisted that, having been so long possessed of the estate, the State had no right to interfere, and could not secure the benefit of the limitation by any legal remedy. "The limitation," said PARSONS, C. J., "is not extinguished by any inattention or neglect in compelling the owner to comply with it, for no laches is to be imputed to the government, and against it no time runs so as to bar its rights." But it seems that a grant or charter from the government, which ought to be by matter of record, may, under certain circumstances, be presumed, though within the time of legal memory. Thus, in an English case, the authority of which has not been questioned, it was held that a presumption of such a grant, founded upon three hundred and fifty years of uninterrupted possession, was warranted.¹ The same rule applies to the general government, and State statutes cannot be interposed to defeat its rights, except where they are sought to be enforced in the tribunals of the State,² and the defence

N. Y. 406, under the provisions of the act of 1870, limiting the time for filing claims against the State to two years from the time the damages accrued, when a claim is presented and proved for continuous damages, part accruing within the two years, the claimant is entitled to recover the damages so accruing; it is only such damages as accrued before that time which are barred by the statute.

Under the provision of the act of 1883, establishing the Board of Claims, which authorizes an appeal to the court from an award by said Board when the amount in controversy exceeds \$500, the amount in controversy is the amount of the claim presented, or the amount which the Board of Claims may legally award the claimant under the proofs, including interest, in a proper case for the allowance of interest.

¹ Mayor of Hull v. Horner, 1 Cowp. 102.

² United States v. Williams, 5 McLean (U. S.), 183; Swearingen v. United States, 11 G. & J. (Md.) 373; Redfield v. Parks, 132 U. S. 239; U. S. v. Nashville, &c. R. R. Co., 118 U. S. 81. In United States v. Hoar, 2 Mas. (U. S. C. C.) 812, an action for money had and received was brought by the United States in the District Court of Massachusetts, to which the defendant set up the statute of limitations of the State. STORY, J., in passing upon the question as to whether these statutes barred the government, said: "The stat-

utes of Massachusetts could not originally have contemplated suits by the United States, not because they were in substance enacted before the Federal Constitution was adopted, on which I lay no stress, but because it was not within the legitimate exercise of the powers of the State legislature. It is not to be presumed that a State legislature mean to transcend their constitutional power, and therefore, however general the words may be, they are always restrained to persons and things over which the jurisdiction of the State may be rightfully exerted. And if a construction could ever be justified which could include the United States at the same time it excluded the State, it cannot be presumed that Congress intended to sanction a usurpation of power by a State to regulate and control the rights of the United States. The mischiefs, too, of such a construction would be very great. The public rights, revenue and property, would be subject to the arbitrary limitations of the States; and the limitations are so various in these States that the government would hold their rights by a very different tenure in each." In United States v. Buford, 8 Pet. (U. S.) 12, the government brought an action against the defendant, who was a deputy commissary-general, for \$10,000 in money which he had received from a deputy quartermaster-general, and for which he gave a receipt in

of laches or stale claim cannot be set up against the general government.¹

As to the general and State government, the old common-law maxim *nullum tempus occurrit regi* applies with full power, unless, as previously stated, the statute otherwise expressly provides.² But this rule only applies when the general government is the sole and real party in interest. Thus, it was held that the Bank of the United States was within the operation of these statutes, although the government was a stockholder therein.³ It makes no difference what the nature or char-

the individual name of such quartermaster-general. The money belonged to the government, and it was held that the government could treat him as its agent in making the defendant their agent, and that the statute of limitations could not be interposed to bar an action for money had and received brought by it therefor. *United States v. Davis*, 3 Pet. (U. S.) 483; *Smith v. United States*, 5 id. 298; *Burgess v. Gray*, 16 How. (U. S.) 48. The United States suing in the Circuit Court is not barred by a State statute. *United States v. Hoar*, 2 Mas. (U. S. C. C.) 811.

¹ *United States v. Dallas Military Road Co.*, 140 U. S. 599; *United States v. Insley*, 180 id. 268; *Steele v. United States*, 118 id. 128; *United States v. Kilpatrick*, 9 Wheat. U. S. 720; *United States v. Nichols*, 12 id. 505; *Gausen v. U. S.*, 97 U. S. 584; *Dox v. Postmaster Gen'l*, 1 Pet. U. S. 818; *Lindsey v. Miller*, 6 id. 666; *Gibson v. Shoto*, 18 Wall. (U. S.) 92.

² *McNamee v. United States*, 11 Ark. 148; *Cram v. Reeder*, 21 Mich. 24. In *Lindsey v. Miller*, 6 Pet. (U. S.) 666, the application of this maxim is vindicated upon the ground that, except for its interposition, "the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government to prevent this result."

³ *United States Bank v. McKenzie*, 2 Brock. (U. S. C. C.) 393. But see *Glover v. Wilson*, 6 Penn. St. 290, in which it was held that, where the government and an individual are jointly interested in a claim, the statute is not a bar to either.

GRAY, J., in *United States v. Nashville, &c. Railway Co.*, 118 U. S. 83, says: "It

is settled beyond doubt or controversy — upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided — that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound. *Lindsey v. Miller*, 6 Pet. 666; *United States v. Knight*, 14 Pet. 801; *Gibson v. Chouteau*, 18 Wall. 92; *United States v. Thompson*, 98 U. S. 486; *Fink v. O'Neil*, 106 U. S. 272.

The nature and legal effect of any contract, indeed, are not changed by its transfer to the United States. When the United States, through its lawfully authorized agents, becomes the owner of negotiable paper, it is obliged to give the same notice to charge an indorser as would be required of a private holder. *United States v. Barker*, 4 Wash. C. C. 464, and 12 Wheat. 559; *United States v. Bank of Metropolis*, 15 Pet. 377; *Cooke v. United States*, 91 U. S. 389. It takes such paper, subject to all the equities existing against the person from whom it purchases at the time when it acquires its title, and cannot therefore maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the statute of limitations. *United States v. Buford*, 8 Pet. 12; *King v. Morrall*, 6 Price, 24.

But if the bar of the statute is not complete when the United States becomes the owner and holder of the paper, it appears

acter of the claim is, as the statute does not apply to any claim in its favor. But a distinction arises where it holds as an assignee of an individual, and the statute has commenced to run before the claim was assigned. Thus, where a note was assigned to the government, and the statute had begun to run before it was assigned, it was held that the claim was subject to the statutory bar.¹ But while the rule is as stated in reference to the government itself, it has no application to suits for or against individuals acting for, or under the authority of, the government, and as to them the statute runs for or against such claims the same as it does against others. Thus, it bars an action against a Federal or State officer for nonfeasance in office;² so a State statute has in some cases been held to bar an action for an infringement of a patent brought in such State;³ but the great weight of authority is opposed to this doctrine, and, generally, it may be said that the statute runs against all claims except those which are sought to be enforced by the government in its name and on its behalf,⁴ and that a grant to an individual or corporation, or a privilege to exercise a particular right exclusively, does not operate as a protection against this statutory bar, in a case to which the statute is otherwise applicable. The government, although not precluded by

to us, notwithstanding the dictum of COWEN, J., in *United States v. White*, 2 Hill (N. Y.), 59, 61, impossible to hold that the statute could afterwards run against the United States. *Lambert v. Taylor*, 4 B. & C. 138; s. c. 6 D. & R. 188.

In the present case, the United States bought the coupons sued on, and the bonds to which they were annexed, long before any of them became payable, or the statute of limitations had begun to run against the right of any holder to sue thereon. The money with which they were bought was money received by the United States from the sale of lands ceded to it by the Chickasaw Nation of Indians. Those lands, the money received from their sale, and the securities in which that money was invested, to be applied for the benefit of those Indians in performance of the obligation assumed by the United States by treaties with them. The securities were thus held by the United States for a public use in the highest sense, the performance of a *quasi* international obligation; and they continued to be so held until that obligation had been performed and discharged, after which they were held by the United

States like all other property of the government, for the ordinary public uses. *Van Brocklin v. Tennessee*, 117 U. S. 151.

The necessary conclusion is that the statute of limitations of Tennessee never ran against the right of action of the United States upon these coupons, either while the United States held them in trust for the Indians, or since it has held them for other public uses, and that the decision of the circuit court was erroneous.

This case does not present the question, what effect the statute of limitations may have in an action on a contract in which the United States has nothing but the formal title, and the whole interest belongs to others. See *Maryland v. Baldwin*, 112 U. S. 490; *Miller v. State*, 38 Ala. 600.

¹ *United States v. White*, 2 Hill (N. Y.), 59.

² *Cluny v. Silliman*, 3 Pet. (U. S.) 270; *Bank of Hartford v. Waterman*, 26 Conn. 324.

³ *Parker v. Hawk*, 2 Fish. (Pat. Cas. U. S.) 58. But see *Parker v. Peeble*, id. 541; *Parker v. Hallock*, id. 543, where a contrary doctrine was held.

⁴ *Miller v. State*, 38 Ala. 600.

the statute, may nevertheless avail itself thereof in suits against it, where there is a statute authorizing individuals to bring suits against it.¹ This was held at an early day,² but the justice of the rule is not apparent. Indeed, there would seem to be no good foundation for the rule, either in principle, reason, or sound morality.³ In some of the States the statute is, in terms, made applicable against the State, either wholly or in special cases.⁴ Thus, in Nevada it is expressly provided that the State "will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless such right or title accrued within ten years before any action or other proceeding for the same, or unless the State or those from whom it claims shall have received the rents and profits of such real property, or some part thereof, within the space of ten years;" and by section 1034 the statute is made applicable in *all* actions against the State the same as against individuals. In Minnesota, the statute is made applicable to "actions brought in the name of the United States, in the same manner as to actions by private parties;"⁵ and an action upon a statute for a penalty is in some cases barred, although brought in the name of the United States. But the statute is not made applicable to the State in any instance. In Oregon, the statute is expressly applied to the State the same as to private individuals;⁶ so also in California⁷ and Michigan.⁸ In New Jersey, a provision relative to actions relative to lands, quite similar to that in the Nevada statute, exists, except that the period of limitation is twenty years.⁹ In New York, the statute in all cases is applicable to actions in favor or in the name of the State the same as to individuals;¹⁰ and such also is the case in Massachusetts¹¹ and Vermont.¹² In Maine, the statute applies to the State as to all real or mixed actions, but not in other matters.¹³ In most of the other States the maxim *nullum tempus*, &c., applies, and in all the States where the statutory bar is only applied in special instances the maxim is applied as to all other matters.

SEC. 53. Municipal Corporations, Counties, &c., within the Statute.—The maxim *nullum tempus occurrit regi* only applies in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign, although their powers in a limited sense are governmental. Thus the statute runs for or against

¹ *Baxter v. State*, 10 Wis. 454.

² 11 Coke, 68 b.

³ *Rustomjee v. The Queen*, L. R. 1 Q. B. Div. 487.

⁴ Nevada, sec. 3, Appendix. In Nevada it is held that the statute of limitations may be set up to defeat an action in the name of the State to recover delinquent taxes. *State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220.

⁵ Minnesota, Appendix.

⁶ Oregon, Appendix.

⁷ California, Appendix.

⁸ Michigan, Appendix.

⁹ New Jersey, Appendix.

¹⁰ New York, Appendix.

¹¹ Massachusetts, Appendix.

¹² Vermont, Appendix.

¹³ Maine, Appendix.

towns and cities,¹ and also for or against counties,² in the same manner as it does for and against individuals. In some of the States the statute is in terms extended to towns, cities, and counties; but independent of such provision the rule is as stated *supra*.

¹ *Cincinnati v. Evans*, 5 Ohio St. 494; *Lane v. Kennedy*, 13 id. 42; *Cincinnati v. First Presbyterian Church*, 8 id. 298; *Conyngham School Dist. v. Columbia Co. (Penn.)*, 6 Leg. Gaz. 26; *School Directors v. Georges*, 50 Mo. 194; *Kennebunk v. Smith*, 21 Me. 445; *Gibson v.*

Choteau, 13 Wall. (U. S.) 62; *Alton v. Illinois Trans., &c. Co.*, 12 Ill. 38.

² *County of St. Charles v. Powell*, 22 Mo. 525; *Evans v. Erie County*, 66 Penn. St. 222; *Baker v. Johnson Co.*, 33 Iowa, 151; *Armstrong v. Dalton*, 4 Dev. (N. C.) 568; *County of Lancaster v. Brenthall*, 29 Penn. St. 38.

CHAPTER V.

COMPUTATION OF TIME.

SEC. 54. "From" and "after."

55. Meaning of the Word "Month."

SEC. 56. When Act is to be done "by" a
Certain Day.

57. Year.

SEC. 54. "From" and "after." — In calculating the various periods fixed by the different statutes of limitation, which date for the most part from the time of the accrual of the cause of action, a difficulty has sometimes arisen whether the day of such accrual ought to be excluded or included in the computation. Generally, inasmuch as fractions of a day are not recognized in law, the day must be either included or excluded in entirety;¹ but instances may arise, and frequently do, especially where a question as to the priority of claims arises, depending upon the order of events occurring on the same day, when the general rule as to the indivisibility of a day will be departed from.² As the law

¹ Notwithstanding the old maxim of law, yet the fiction that there is no fraction of a day will, it is said, no longer prevail, where it becomes essential for the purposes of justice to ascertain the exact hour or minute. *Pearpoint v. Graham*, 4 Wash. (U. S. C. C.) 232.

² *Cincinnati Bank v. Birkhardt*, 100 U. S. 686. In *Ferris v. Ward*, 9 Ill. 499, it was held that the jury might consider fractions of a day, *Tufts v. Carradine*, 3 La. An. 430; but except where the ends of justice or the settlement of important rights demand it, fractions of days are not noticed, *Price v. Tucker*, 5 id. 514. Whenever the whole day and every moment of it can be counted, then it should be; whenever, if it were counted, the party would in fact have but a fractional part of it, then it should not be counted. Thus, since an infant is competent to bring suit at any moment upon the day before his twenty-first birthday, such day is to be included in the computation of ten years, which the statute of limitations allows after the removal of the disability of infancy. *Phelan v. Douglass*, 11 How. (N. Y.) Pr. 193. In the ordi-

nary legal computation of time there are no fractions of a day; and the day on which an act is done must be entirely excluded or included. *Jones v. Planters' Bank*, 5 Humph. (Tenn.) 619; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Re Welman*, 20 Vt. 653. The whole of a term is considered as one day; and by a legal fiction, the time between the submission and decision of a cause is considered as but one day; and so, although a party may die between the time of the decision in the Arkansas Supreme Court and the filing of the mandate of the Supreme Court of the United States on reversal, no change of parties will be made in the Supreme Court, before carrying into effect the judgment of the United States court. *Cunningham v. Ashley*, 13 Ark. 653. In estimating the amount of damages caused by obstructing a public way, the jury may consider fractions of a day, *Ferris v. Ward*, 9 Ill. 499; and where an act is to be done in the first half of a month of thirty-one days, they contract that it shall be done by noon of the sixteenth day, *Grosvenor v. Magill*, 37 Ill. 239. The time for completing commercial contracts

on this point is neither satisfactory nor certain, and as the question is one not belonging peculiarly to the subject of this work, it will suffice here to discuss the matter very briefly. The question was carefully considered and the then existing authorities examined in an English case;¹ and the result of the decision in that case is, that there is no settled general rule, and that the day of the event in a given case must be excluded or included, as may be most conducive to the beneficial operation of the act. But that where the act from which time is to begin to run is one to which the party who seeks to extend that period is privy, there is a presumption in favor of including the day of such act or period. In a Massachusetts case,² it was held that in the computation of the time (six years) within which the statute runs upon a note payable on demand, the day upon which the cause of action accrued is to be included, and that upon such a note dated Nov. 1, 1811, the statute bar was complete on the 1st of November, 1817.³ But in a later case⁴ that court held that, in computing the period (two years) within which an administrator may be sued, the day on which his bond is given is to be excluded. In Pennsylvania, in a quite recent case,⁵ it is held that the day on which a cause of action accrues is to be excluded, in computing the time of limitation for bringing actions. And such also is the rule laid down in a New York case;⁶ and this rule is also adopted in Kentucky.⁷ In Missouri,⁸ where goods were delivered

is not limited to banking hours. A party has the whole business day to deliver or to pay. *Price v. Tucker*, 5 La. An. 514. The general rule, that the law admits no fractions of a day, is subject to numerous exceptions. The law sometimes expressly forbids the different hours of the same day from being recognized as affecting the rights of parties; but the prohibition must be confined to the cases enumerated. *Tufts v. Carradine*, 3 La. An. 430. By the statute of 21 Hen. III., the twenty-eighth and twenty-ninth days of February are reckoned as one day. That statute is in force in Indiana, it being prior to 4 James I. *Swift v. Tousey*, 5 Ind. 196. Fractions of days will only be noticed when necessary to prevent great mischief. *Hampton v. Erenzeller*, 2 Browne (Penn.), 18; *Slingluff v. Ambler*, 2 W. N. C. (Penn.) 67; *Malvin v. Sweitzer*, 2 Luz. Leg. Obs. (Penn.) 35. In the service of writs, and in other cases where the ends of justice require it, the inquiry may be directed to the part of the day, to the hour, minute, or second even, if necessary, a certain act was done. *Wrangham*

v. Hersey, 3 Wils. 274; *Cutter v. Wadsworth*, 7 Conn. 6; *Brainerd v. Bushnell*, 11 id. 24.

¹ *Lester v. Garland*, 15 Ves. 248.

² *Presbrey v. Williams*, 15 Mass. 193.

³ See also *Little v. Blunt*, 9 Pick. (Mass.) 488; *Rex v. Adderley*, Doug. 462; *Glassington v. Rawlins*, 3 East, 407; *Castle v. Burditt*, 3 T. R. 623.

⁴ *Paul v. Stone*, 112 Mass. 27.

⁵ *Menge v. Frick*, 73 Penn. St. 137.

⁶ *Judd v. Fulton*, 10 Barb. (N. Y.) 117, in which it was held that, in computing time, the first day, or the day on which time begins to run, is excluded; and that where an act is to be done within a given time, as thirty days, the party has the whole of the thirtieth day in which to perform it. But that if it is to be done after thirty days, the party has the whole of the thirty-first day in which to complete it, as the law takes no notice of fractions of a day.

⁷ *Smith v. Cassidy*, 9 B. Mon. (Ky.) 496.

⁸ *Steamboat Mary Blane*, 12 Mo. 477.

to a vessel under a special contract, it was held that a lien attached on the day of the delivery of the first parcel, and that, in estimating the time when the statute begins to run, the day of the delivery should be excluded.¹ In New Hampshire,² where a computation is to be made from the time of an act done, the day when the act is to be done is included; but when the computation is to be made from or after a certain date, or from the day of date, the day of the date is to be excluded; and this seems to be the rule in Pennsylvania,³ Kentucky,⁴ Indiana,⁵ Illinois,⁶ Massachusetts,⁷ and Alabama.⁸ But this rule is subject to the exception that there is nothing in the instrument evincing a different intention.⁹

¹ See also *Blackman v. Nearing*, 34 Conn. 55, where the day of the date of a note was held to be excluded in determining the question whether the statute had run thereon.

² *Blake v. Crowningshield*, 9 N. H. 304.

³ *Hampton v. Erenzeller*, 2 Browne (Penn.), 18; *Wagner v. Duffy*, 1 Phila. (Penn.) 369. But see *Lysle v. Williams*, 15 S. & R. (Penn.) 135; *Taylor v. Jacoby*, 2 Penn. St. 495, where it was held that, where the words "from the date" are used to denote the *terminus à quo*, an immediate interest is to pass, the day of the date is inclusive, but that the rule is otherwise when used by way of computation in an instrument to perpetuate the evidence of a debt. In *Presbrey v. Williams*, 15 Mass. 193, an action was brought upon a promissory note, and the statute of limitations was set up in defence. More than six years had elapsed from the date of the note, which was payable on demand, but a payment was indorsed thereon under date of Nov. 1, 1811. The action was brought Nov. 1, 1817, and the court held that the statute was a bar. See also *Holden v. James*, 11 id. 400, where it was held that where an administrator accepted his trust on the second day of December, 1806, it was held that the four years limited by law expired on the 2d of December, 1810; also *Bigelow v. Wilson*, 1 Pick. (Mass.) 485, where, in the time allowed by statute for redeeming a right in equity sold on execution, which must be within one year after the execution of the deed by the officer to the purchaser, it was held that the day on which the deed was executed must be excluded. See also *Paul v. Stone*, 112 Mass. 27, where a similar rule was

adopted. In *Cornell v. Moulton*, 3 Den. (N. Y.) 42, an action was brought upon a note payable on demand. The note was dated Feb. 14, 1839, and action was brought thereon Feb. 14, 1845; and the question was, whether the note was saved from the operation of the statute. The court held that it was, *BRONSON, C. J.*, saying: "Our cases all go to establish one uniform rule, whether the question arises upon the practice of the court, or the construction of a statute, and the rule is to exclude the first day from the computation." In a late case in Connecticut, *Blackman v. Nearing*, 43 Conn. 55, this rule, as expressed in several previous cases by that court, referred to in this chapter, that the day of the date of a note should be excluded, is reiterated, and it is also held that the circumstance that the note is made payable at a bank does not change the rule. In other words, that a note made payable at a bank does not become payable any sooner from that circumstance. See, upon this latter point and to the same effect, *Salt Springs Nat. Bank v. Barton*, 58 N. Y. 430; *Osborne v. Moncure*, 3 Wend. (N. Y.) 170.

⁴ *Chiles v. Smith*, 13 B. Mon. (Ky.) 460; *White v. Crutcher*, 1 Bush (Ky.), 472; *Handley v. Cunningham*, 12 id. 402; *Wood v. Com.*, 11 id. 220.

⁵ *Brown v. Bazan*, 24 Ind. 194.

⁶ *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

⁷ *Bemis v. Leonard*, 118 Mass. 502.

⁸ *Goode v. Webb*, 52 Ala. 452.

⁹ *Goode v. Webb*, *ante*; *Bemis v. Leonard*, *ante*. The day of the date of a note is excluded in the computation of the time of payment. *Homes v. Smith*, 16 Me.

In South Carolina, it is held that the day from which the reckoning commences and that on which it terminates may both be included or excluded, as will best preserve a right or prevent a forfeiture;¹ and the same rule prevails in Texas,² Maine,³ and Missouri.⁴ In several of the States, in the computation of time from an act done, the day on which the act is done is excluded, as in Texas,⁵ Alabama,⁶ New York,⁷ Missouri,⁸ Michigan,⁹ and Connecticut;¹⁰ and this rule is applied to all species of contracts and bills of exchange, promissory notes, policies of insurance, wills, and all other instruments; and they are to be so understood that the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded from the computation.¹¹ But all these rules are subject to the exception that they must

181. From the computation of time, the day of publication of the notice should be excluded; the words "after" and "from" being words of exclusion. *Page v. Weymouth*, 47 Me. 238. Where an event is determined to have happened within two points of time, it will be considered as having happened in the middle of the intermediate space of time. *Contee v. Dawson*, 2 Bland (Md.), 264. Where time is to be computed from or after a certain day, that day is to be excluded in the computation, unless it appears that a different computation was intended; for no moment of time can be said to be after a given day, until that day has expired. *Bigelow v. Wilson*, 1 Pick. (Mass.) 485; *Pyle v. Maulding*, 7 J. J. Mar. (Ky.) 202; *Jacobs v. Graham*, 1 Blackf. (Ind.) 392; *Arnold v. United States*, 9 Cranch (U. S.), 104; *Rand v. Rand*, 4 N. H. 267; *Goswiler's Case*, 3 Penn. 200; *Blanchard v. Hilliard*, 11 Mass. 85; *Woodbridge v. Brigham*, 12 id. 403, 13 id. 556; *Henry v. Jones*, 8 id. 453; *Lorent v. South Carolina Ins. Co.*, 1 N. & M. (S. C.) 505; *Bowman v. Wood*, 41 Ill. 203; *Wiggin v. Peters*, 1 Met. (Mass.) 127; *Ewing v. Bailey*, 5 Ill. 420. Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month must govern. *Ingersoll v. Kirby, Walk.* (Mich.) 27.

¹ *State v. Schnierle*, 5 Rich. (S. C.) 299.

² *O'Connor v. Lewis*, 1 Tex. 107.

³ *Windsor v. China*, 4 Me. 298. In Maine it is held that the day of the date of a note is excluded in the computa-

tion of the time of payment. *Holmes v. Smith*, 16 Me. 181. See also *Page v. Wentworth*, 47 id. 238, where the same rule was extended to the publication of a notice.

⁴ *State v. Gasconade*, 33 Mo. 102.

⁵ *Burr v. Lewis*, 6 Tex. 76.

⁶ *Lang v. Phillips*, 27 Ala. 311.

⁷ *Cornell v. Moulton*, 3 Den. (N. Y.) 12. In *McGraw v. Walker*, 2 Hilt. (N. Y.) 404, this doctrine was reaffirmed, and in an action upon a note which became due on the 4th of October, 1852, and upon which an action was commenced Oct. 5, 1858, it was held that it was seasonably commenced, as the day of the accrual of the action must be excluded.

⁸ *Kimm v. Osgood*, 19 Mo. 60.

⁹ *Gorham v. Wing*, 10 Mich. 486.

¹⁰ *Sands v. Lyon*, 18 Conn. 28; *Avery v. Stewart*, 2 id. 69.

¹¹ *Weeks v. Hull*, 19 Conn. 381. Where, in a statute, time is computed from an act done, the first day is excluded. *Bigelow v. Wilson*, 1 Pick. (Mass.) 487; *Homan v. Lowell*, 6 Mass. 659; *Preebles v. Hannaford*, 18 Me. 106. In New York it is held, in computing time given by statute, both the first and last days should be excluded, *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260; so also in Kentucky, *Sanders v. Norton*, 4 T. B. Mon. (Ky.) 464. In Pennsylvania, it has been held that the first day is included, and the last excluded, *Thomas v. Afflick*, 16 Penn. St. 14; but the rule now in that State is well established, that when a certain number of days are allowed to do an act in, as, whenever by rule of court or statute a certain number of days are allowed to do an act

yield, when necessary, to the justice of the case, so as to protect the rights of the parties and prevent a forfeiture, if this can be done without violating a clear intention of the parties or a positive provision of the contract.¹ By some of the cases, a distinction has been taken between the date and the day of the date of a written instrument, and between mercantile contracts and others, and between contracts and statutes; but these distinctions were so prolific of confusion and of so little practical importance, that the more modern cases ignore them,² and they are applied alike to all classes of contracts, instruments, statutes, &c. In a Connecticut case,³ in which the construction of a will was involved, and in determining the time within which a legacy became payable under it, the court excluded the day from which the computation was to commence. "Instruments," said STORRS, J., "should be constructed, if possible, so that they and the rights depending upon them shall be upheld and not destroyed; the presumption being that instruments are designed to be effectual and not futile." In that case the testator left all his real estate to his son John, "provided that he do pay in one year next after my decease to each of my daughters," naming them, "one hundred dollars." The testator died on the second day of October, 1841, which was Sunday. On the third day of October, 1842, he tendered to each of the persons named in the will the sum of one hundred dollars; and it was claimed that the tender was too late, and that the title to the land so conditionally devised thereupon vested in the plaintiffs, and that they were entitled to eject the defendant therefrom. But the court

in, or it is said that an act may be done within a given number of days, the day on which the rule is taken or the decision is made is to be excluded, *Black v. Johns*, 68 id. 83; *Thomas v. Premium Loan Assn.*, 3 Phila. (Penn.) 425; *Monks v. Russell*, 40 Penn. St. 372; *Duffy v. Ogden*, 64 id. 240; *Cromelin v. Brink*, 29 id. 522, overruling *Thomas v. Afflick*, *ante*. Thus, a notice to quit on the 12th of May is served in time on the 12th of February. *McGowen v. Sennett*, 1 Brewst. (Penn.) 397. An appeal from the Orphan's Court made on Oct. 8, 1829, is in time if entered Oct. 8, 1830, it being within one year, excluding the day of appeal, *Eye's Appeal*, 2 Watts (Penn.), 283; *S. P. Browne v. Browne*, 3 S. & R. (Penn.) 496; *Sims v. Hampton*, 1 id. 411; and in a late case it is held that the day on which the cause of action accrued should be excluded in computing the time of limitation for bringing actions, *Menges v. Frick*, 73 Penn. St. 137.

¹ *Bigelow v. Wilson*, *ante*; *Weeks v. Hull*, 19 Conn. 381; *Windsor v. China*, *ante*. In *Blackman v. Nearing*, 43 id. 56, the court lay down the doctrine that as a general rule, in all cases where a period of time is to be reckoned from a particular day or event, whether under a contract, will, or statute, or in legal proceedings, the day of such date or event is to be excluded from the computation. It makes the important exception, however, that, where a different intent appears in a particular case, the intent is to prevail. "No rule," says FOSTER, J., "is to be so sternly enforced as to defeat the intent of the parties. That is always paramount to all other considerations, and is always to be carried into effect, if not contrary to law or public policy."

² *Weeks v. Hull*, *ante*; *Menges v. Frick*, 73 Penn. St. 137; *Windsor v. China*, *ante*.

³ *Sands v. Lyon*, 18 Conn. 28.

held that the whole of the second day of October, 1842, should be excluded, and consequently that a tender on the third day of October of the succeeding year, the second day being Sunday, was in time.¹ In an English case, often cited,² the question was, whether the execution

¹ In *Lester v. Garland*, 15 Ves. 246, the day of the testator's decease was excluded, in a case where, under a will, there was a bequest of personal property to trustees in trust, that in case A. should "within six months after my decease" give security not to marry B., "then, and not otherwise," the trustees should pay the amount of said estate to the children of A., with a proviso that it should go over if A. should neglect or refuse to give such security. The court held that, in computing the six months, the day of the testator's death should be excluded; and that as he died on the twelfth day of January, and the security was given on the 12th of the next July, the condition had been complied with. SIR WILLIAM GRANT, M. R., after remarking that the happening of an event stands upon the same ground as the doing of an act, said that "whatever dicta there might be to the effect that the day of the act or event is always to be excluded, it is clear that the actual decisions cannot be brought under any such head." He expressed the opinion that it would be much more easy to maintain that the day of an act done, or event happening, ought in all cases to be excluded, than that it should be in all cases included; and, after giving his reasons for that opinion, he concludes by saying that whether the day shall be excluded or included is not to be determined by any general rule, but must depend on the reason of the thing, according to the circumstances of the case.

² *Pugh v. The Duke of Leeds*, Cowp. 714. As the question involved is one of practical importance, and likely to continue to be so for some time, at least until there is more uniformity in the decisions involving this question, I give the main portion of LORD MANSFIELD'S masterly opinion in this case. He said: "This case was an issue to try whether a lease made by one Godolphin Edwards, bearing date the 10th October, 1765, was a good or bad lease. The case went down to trial, and several objections were raised; but they were all

given up except one, which was this: that the lease was made for twenty-one years, to commence 'from the day of the date.' It arises on a marriage settlement, in the year 1724, by which a power is reserved to Godolphin Edwards to make leases, with many restrictions and qualifications, and among the rest the following: 'that they were not to be in reversion, remainder, or expectancy;' and, therefore, the question is, 'whether this be a lease in possession;' and it turns upon this, 'whether to commence from the day of the date in this deed is to be construed inclusive or exclusive of the day it bears date.' I will first consider it as supposing this a new question, and that there never had existed any litigation concerning it. In that light, the whole will turn upon a point of construction of the particle 'from.' The power requires no precise form to describe the commencement of the lease; the law requires no technical form. All that is required is only enough to show that it is a lease in possession, and not in reversion; and, therefore, if the words used are sufficient for that purpose, the lease will be a good and valid lease. In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word 'from' must always depend upon the context and subject-matter, whether it shall be construed inclusive or exclusive of the *terminus a quo*; and whilst the gentlemen at the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word 'inclusive' or 'exclusive,' the matter would have been very clear. If they had said, 'from the day of the date inclusive,' the term would have commenced immediately; if they had said, 'from the day of the date exclusive,' it would have commenced the next day.

"But let us see whether the context and subject-matter in this case do not show

of a lease for twenty-one years, to commence from the day of the date, was a compliance with a power reserved in a marriage settlement, to lease

that the construction here should be inclusive, as demonstrably as if the word 'inclusive' had been added. This is a lease made under a power; the lease refers to the power; and the power requires that the lease should be a lease in possession. The validity of it depends upon its being in possession; and it is made as a provision for an only daughter. He must, therefore, intend to make a good lease. The expression then, compared with the circumstances, is as strong in respect of what his intention was as if he had said in express words, 'I mean it as a lease in possession,' 'I mean it shall be so construed.' If it is so construed, the word 'from' must be inclusive. This construction is to support the deeds of parties, to give effect to their intention, and to protect property. The other is a subtlety to overturn property, and to defeat the intention of parties, without answering any one good end or purpose whatsoever. And though courts of justice are sometimes obliged to decide against the convenience, and even against the seeming right, of private persons, yet it is always in favor of some greater public benefit. But here, to construe 'from the day of the date' to be exclusive, can only be to defeat the intention of the parties. If such a construction were right, it would hold good, supposing the lessee had laid out ever so much money upon the estate; and all would be alike defeated by a mere blunder of the attorney or his clerk. Therefore, if the case stood clear of every question or decision which has existed, it could not bear a moment's argument.

"*Secondly.* I will consider this question upon the authorities. I have arranged all the cases that have been determined in Westminster Hall, in order of time; and when I come to state them, you will be surprised to see they stand so little in the way as binding authorities against justice, reason, and common sense. All they show is the great uncertainty of the meaning, and the impossibility of putting an absolute sense to hold good in all cases; they are themselves so many contradictions backwards and forwards.

"The first case in point of time was in Mich. 4 El. Dyer, 218 *b*; Moore, 40, s. c. This was a question that arose upon the statute of enrolments, 27 Hen. VIII. c. 16, which says, 'that the enrolment shall be made within six months next after the date of the deed.' The indenture in question bore date the 9th October, 1557; it was enrolled in chancery on the 21st March, 1558, which was the last day of the six months, reckoning twenty-eight days to each month, and making the day of the date exclusive. The court held 'that the indenture was well enrolled, and that the words "next after the date of the deed" were exclusive of the day of the date.' This decision was in favor and in support of the deed; otherwise it would have been void. And yet it has been determined that in a note of hand, payable ten days after sight, the day of the sight is inclusive. *Bellasis v. Hester*, 1 Ld. Raym. 281. Why? Because of the subject-matter, that there should be no further time to make the demand; and yet, after the day and after sight is precisely the same in language.

"The next is Clayton's Case, 5 Coke, 1 Mich. 27 El. The point in question was the meaning of the words 'from henceforth,' which were accounted from the day of the delivery, and as much as to say, 'from the making.' But the court held that 'from the making' was inclusive, and 'from the day of the making' was exclusive.

"The next is Trin. 39 Eliz., 5 Co. 90, Barwick's Case, which was a demise of a freehold lease by letters-patent, '*habendum a die confectionis earundum literarum patentium.*' The day of the date was held to be exclusive, and the letters-patent therefore void.

"In Mich. 4 Jac., Cro. Jac. 135, Osborn *v. Ryder*, 'from the date' was held to be inclusive, and different from the time or day of the date, which is exclusive. In Trin. 8 Jac., Cro. Jac. 258, Llewellyn *v. Williams*, it was held 'that from the date' and 'from the day of the date' meant both exactly the same thing, and both exclusive of the day.

"The next case in order of time is Trin.

for twenty-one years “in possession, but not in reversion,” and the whole matter turned upon the question whether the phrase “to commence from

9 Jac., 1 Bulst. 177, the very year afterwards; and there it is said by Fleming, that ‘from the date’ includes the day, and ‘from the day of the date’ excludes it. Now, thus the cases stand, down to the 14th of James. They are yes and no, and a medium between them. But in Trin. 14 Jac., 1 Rolle’s Rep. 387, 3 Bulst. 204, s. c., COKE, Chief Justice, and the whole court, in the case of Bacon v. Waller, held, agreeably to Llewellyn’s Case, Trin. 8 Jac., that ‘from the date,’ and ‘from the day of the date,’ meant both exactly the same thing, and both were exclusive.

“Thus it stood then for settled law, by these two solemnly adjudged cases, that both meant exactly the same thing. So it stood likewise at the time of the publication of Coke’s Commentary on Littleton, which was about ten years afterwards; and so clear was LORD COKE in his opinion that the point was settled by those two judgments, that he adopts the judgment in positive words, without restriction or qualification; and in Co. Lit. 46 b, he lays it down as text law, that both mean the same thing, and that both are exclusive. So it seems to have stood down to Trin. 24 Car. I. At that time mankind began to revolt at such a doctrine. There, in the case of Cornish v. Cawsay, Aleyn, 77, Style, 118, s. c., in an action of debt against an executrix, the plaintiff declared upon a lease, ‘from the day of the date,’ for seven years. The lease was in these words, ‘from the day of the date,’ for the term of seven years, from henceforth next and immediately following, with a great many other words. It was contended that though ‘from the day of the date’ was exclusive, yet the words ‘from henceforth,’ &c., being added, made it inclusive, and this was objected as a variance between the declaration and the deed. The court left it to the jury; the jury threw it back upon the court, and brought in a special verdict, stating the lease verbatim; and then the court held that, according to the authorities, ‘from the day of the date’ was exclusive, and, therefore, the plaintiff had mistaken his lease. But, at the same time, they seemed shocked at its being so; for,

say the court, ‘if there was a question upon letters-patent, like Barwick’s Case, to make the patent good, the jury might find they were made the last instant of the day.’ This they observed to get rid of the force of a wrong determination. Just so SIR EARDLY WILMOT once did in a case that came before him. He left it to the jury to find that livery was made the last moment of the day. The authorities, therefore, of Coke Littleton, 46 b, Bacon v. Waller, 3 Bulst. 204, 1 Roll. Rep. 387, s. c., and Llewellyn v. Williams, Cro. Jac. 258, were at that time grumbled at, as being against the sense of mankind, against convenience, and against justice, and founded upon subtleties that even the schoolmen would have been ashamed of. The doctrine they established was, that both meant the same thing, and both were exclusive. With respect to their both meaning the same thing, unquestionably they were right. For what is ‘the date’? The date is a memorandum of the day when the deed was delivered. In Latin it is ‘datum;’ and ‘datum tali die’ is, delivered on such a day. Then, in point of law, there is no fraction of a day: it is an indivisible point. What is ‘the day of the date’? It is ‘the day the deed is delivered.’ ‘The date,’ therefore, being also defined to be the day the deed is delivered, ‘the date’ and ‘the day of the date’ must be the same thing. The day of the date is only a superfluous expression. It is impossible in common sense to distinguish the one from the other. ‘Date’ does not mean the hour or the minute, but the day of delivery; and in law there is no fraction of a day. As to the other point, that ‘from’ shall in all cases be construed to be exclusive, it is contrary to the common signification of language. And for courts of justice to determine words against the intention of parties, and against the generally received sense and acceptation of the words themselves, is laying a snare to entrap mankind. Usage decides upon the force of language; and, with respect to this word, has imprinted on the understandings of men in general, in their transactions in life, the

the day of the date" was to be construed as excluding or including the day on which the lease bore date, because upon that would depend

sense that I now put upon it; whilst courts of law understand it in a wholly different sense.

"Thus it stood down to the sixth year of William and Mary. A case then happened of considerable property, and not merely a question of pleading. *Hatter v. Ash*, 3 Lev. 438, 1 Ld. Raym. 84. It arose upon a prebendal lease to commence from the date of the indenture. The successor wished to avoid it on the ground of its being a lease to commence *in futuro*. The case was several times argued; against the lease upon the weight of authorities, and in favor of it, upon the ground of the intention of the parties, '*ut res magis valeat quam pereat*.' After several arguments, TREBY, Chief Justice, at first, from the strength of reason, was for supporting the lease, and then, staggered by the weight of authorities, changed his opinion; but when the judgment was given he absented himself. POWELL, Jun., at first followed the authorities, but afterwards came over to reason; and at last it was agreed, by NEVILLE and the two POWELLS, that 'from the date' ought to be construed inclusive, and therefore that the lease was good. Now, though there was something said in the argument as to the distinction between the date and the day of the date, the authorities said they were the same; and yet this determination went to the matter of right in the question, and supported the lease.

"The next case after this was Trin. 11 Wm. III., 1 Ld. Raym. 480. It was upon a policy of insurance, dated the 3d September, 1697, upon the life of Sir Robert Howard, for a year, 'from the day of the date' of the policy. Sir Robert died upon the 3d of September, 1698, at one o'clock in the morning; and HOLT, Chief Justice, held that from the day of the date was exclusive; but he held that the insurer was liable, because in law there is no fraction of a day, and Sir Robert died at one o'clock in the morning, whereas to vacate the policy he should have lived till twelve o'clock at night. In that case there was no argument to be drawn from the subject-matter, for in the policy it was totally in-

different when it should begin; the argument rather was that it should begin the day after. In the next place, it would have included the insurance if it had begun that day. LORD CHIEF JUSTICE HOLT seems to have considered it as a favorable case for the insured, otherwise he would not have had recourse to the old maxim of law, that there is no fraction of a day. He cited a case, Anon., 1 Salk. 44, where it was held that if a man lived to the eve of the anniversary of his birth, no longer even than till one o'clock in the morning of that day, and made his will, by having touched the verge of the day, it was the same as if he had completed the whole day; and the will was declared a good one. That existed as law; but HOLT, in his application of it, turned it the other way. I look upon this case as of very little authority, there being no argument from the subject-matter.

"Another case happened since, in Hil. 4 Ann., *Seignorett v. Noguire*, 2 Ld. Raym. 1241. This case, though a very material case, was not cited in the Exchequer, the present point not being the question litigated, but arising out of some collateral matter; and therefore the indexes have not led counsel to it. It was upon a point of pleading, and the whole court held that to aver that a contract was to commence 'with the day of the date' was the same thing as to aver that it commenced 'from the day of the date.' HOLT, Chief Justice, said that 'from the date' was inclusive, and so was the same as 'with the date,' but that 'from the day of the date' was exclusive. But POWELL said that 'from the date' and 'from the day of the date' had been adjudged to be the same in the Common Pleas. That case in the Common Pleas is not to be found. It could not be the case of *Hatter v. Ash*. But all the court determined that 'from the day of the date' was the same as with the day of the date, and inclusive. If 'from the date,' therefore, is inclusive, it must be the same as 'from the day of the date.' I have been supplied with another case this morning by MR. JUSTICE ASTON: the name of it is *Thompson v. Vanbeek*, before LORD HARD-

whether the lease was a lease in possession. The court established the principle that the words "from the day of the date," when used in an

WICKE in Mich. 1736. It was an action brought upon an usurious contract, and the question turned upon a point of pleading. The rule laid down by LORD HARDWICKE in that case shows that he went upon the same principle, and reasoned just as I do now, that 'the construction must always depend upon the subject-matter.'

"Here MR. JUSTICE ASTON stated this case from his own note as follows: *Thompson v. Vanbeek* was never determined, but as it stood the case was this, — it was an action on the statute of usury. The declaration said, 'giving day of payment from the 26th.' Upon the evidence it appeared that the bond was given on the 27th. The question was, whether, as the declaration stated 'giving day of payment from the 26th,' this was a variance. That depended upon whether the word 'from' should be construed inclusive of the 26th, or exclusive. What LORD HARDWICKE said was this: 'the computation is to be made from the time of the act done;' and though there are a variety of constructions of the word 'from,' yet it depends entirely upon the nature of the thing; and that it should so depend is the right rule. The consideration for the interest paid is giving day of payment. I think it includes the day; and my reason is, that it would be a strange construction to say that the day of payment shall be antecedent to the time of advancing the money; so *ut res magis valeat quam pereat*, it is inclusive. But the case was never decided.

"Thus stood all the authorities down to the year 1743, a period of two hundred years, — not much to the honor of the learned in Westminster Hall, to embarrass a point which a plain man of common sense and understanding would have no difficulty in construing.

"There then happened a case of great litigation in the Exchequer, which arose thus: Lord Pembroke had got a lease from the crown of a spot of ground in Privy Garden, and had built a house upon it at a great expense. The Countess of Portland had also a lease upon an adjoining spot, and had built her house next to Lord Pembroke's. There was another house be-

longing to the Duchess of Portland, adjoining Lady Portland's, — all three held under the crown. Between the three houses and the river Thames there was a terrace, which had been part of the queen's garden. Neither of them thought of applying for the terrace, and it would have been thought invidious to have done so. It was to be in common. Upon the circumstance of this terrace, Lord Pembroke laid out a considerable sum of money upon his house. At the expiration, however, of her lease, the Countess of Portland applied to renew. A new lease of fifty years was granted, in which, without notice to Lord Pembroke, she got the terrace inserted and added. When Lord Pembroke heard of it he was much offended, but still more so at the use that was made of it; for the Countess planted trees, which, if they had grown up, would have intercepted Lord Pembroke's view, — however, some fatality attended them, for they all died after a certain time. Lord Pembroke wanted to avoid this lease, — not to take away Lady Portland's house, but to get back the terrace, and leave it in the state it was before. Application was accordingly made to the officers of the crown about it; and at last the Attorney-General was directed to file an information for the terrace; and an information was accordingly filed in the Exchequer. A variety of objections were made to different flaws, supposed in the lease; but the principal objection was founded upon the Civil List Act, 1 Ann. st. 1, c. 7, which directs that all leases to be granted of any of the crown lands shall be void, 'unless made to commence from the date or making.' This lease was made to commence from the 'day of the date or making.' Upon this it was argued for the crown 'that the date and the day of the making were inclusive, and that the act of Parliament had expressly declared the lease should be in those terms; but that from the day of the date was exclusive, and therefore the lease was void for the variance.' On the part of the Countess it was contended that 'from the date' and 'from the day of the date' were both the same. Upon the argument all the cases were cited

instrument, were to receive an inclusive or exclusive sense, according to the intention with which they were used, to be derived from the context and subject-matter, and so as to effectuate, and not destroy, the deed of the parties, and that there was no absolute or invariable sense to be attached to them. This view was adopted in a Pennsylvania case,¹ in which TILGHMAN, C. J., stated his conclusion to be, after a careful examination of the authorities, that the day on which the act is done is excluded or included, as the nature of the case indicated to the court that a liberal or vigorous construction should be adopted.²

that have been now cited, except the two I have mentioned.

"SIR THOMAS PARKER and MR. BARON REYNOLDS were of opinion with the objection, that it was a void lease, because it commenced *in futuro*. The two other barons were of a different opinion upon this point; but upon another point they were of opinion the lease was void. SIR THOMAS PARKER and MR. BARON REYNOLDS to the contrary; so that, for different reasons, they were all of opinion the lease was void. Upon a case which happened in this court since, *Bayntun v. Watton*, this case between Lord Pembroke and the Countess of Portland was mentioned. Upon memory, as the judgment appeared to me in so unfavorable a light, I took it for granted that the court had been, as it were, compelled by the weight and force of authorities. But now I will tell you why I change my opinion, after having determined the case of *Doe v. Watton*, as I then did, out of a great veneration for SIR THOMAS PARKER, and because I did not care to set up an opinion of my own mind against a solemn judgment. SIR THOMAS PARKER, intending to favor the world with the publication of some cases that were adjudged in his time, he did me the honor to desire I would peruse them. I have done so; and reading a very elaborate report of the Countess of Portland's case, brought back to me in a regular view the whole doctrine upon the present subject. There I saw how the authorities stood, how the reasoning stood; and I likewise found another thing mentioned in that case, which seems to me not to have been properly argued at the bar by the counsel in support of the lease. It is this: the parties concerned had searched all the leases from the time of the Civil List Act down to the moment of that upon which the question was then in agitation, and they were nearly half the one way and

half the other, — eighty were granted 'from the date or making,' and above seventy 'from the day of the date or making.' All these leases had passed the great seal, and likewise the seal of the Exchequer. The argument drawn from this circumstance was, that usage should get the better, and prevail over the act of Parliament, which was in fact an admission at the same time by implication that 'from the day of the date' was contrary to the act. It struck me in a different light, which is, that the question turned upon the construction of the English words, and what sense they bore. If I was right, nothing can be so strong as that all the officers of the crown who had been concerned in making these leases looked upon the words as synonymous, and suffered them to pass and repass unnoticed. It is demonstration that, by using both indifferently, they understood them to be both the same thing.

"To conclude, the ground of opinion and judgment which I now deliver is that 'from' may, in vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense, which made their deed effectual; that courts of justice are to construe the words of parties so as to effectuate their deeds, and not destroy them, more especially where the words themselves abstractedly may admit of either meaning."

¹ *Sims v. Hampton*, 1 S. & R. (Penn.) 411.

² *O'Connor v. Lewis*, 1 Tex. 107. In *Pellew v. Hundred of Winford*, 9 B. & C. 139, LORD TENTERDEN said that it was impossible to reconcile all the cases, or to deduce from them any clear rule or principle. In an action on the statute of hue and cry, *Norris v. Hundred of Gautris*, Hobart, 139, it was decided by a majority of the court that the day of the robbery was to be included in computing the period within

SEC. 55. **Meaning of the Word "Month."**—In England, in the absence of special circumstances which may lead to a contrary conclusion, a month is usually held to mean a lunar and not a calendar month. But now it is enacted by statute¹ that in all statutes the word "month" shall be deemed and taken to mean calendar month, unless words be added which show that lunar month is intended. The effect of this statute is, therefore, in regard to the construction of acts of Parliament, to shift the onus of proof of the meaning of the term. But except so far as the act extends, the term "month" still in temporal matters *prima facie* means lunar month, though it is otherwise in ecclesiastical matters.² In mortgage transactions, a month means calendar month. In considering what is the length of a calendar month, it is sufficient, when the months are broken, whatever may be their length, to go from one day in one month to the corresponding day in the other.³ But, whatever may be the rule at the common law, it is now quite well established in the courts of this country that, when the word "month" is employed in a statute, it is considered as a calendar month;⁴ and such is also the rule when it is referred to in legal proceedings,⁵ bills of exchange, and promissory notes,⁶ deeds, contracts, or other obligations.⁷

which it was necessary to bring the action. This was so decided partly on the ground that though the party robbed was deserving of relief and pity, yet as against the innocent hundred the law was highly penal. Under the statute 2 Geo. II. c. 23, which directs that no solicitor shall commence an action for the recovery of his fees until the expiration of one month after he shall have delivered his bill, it has been decided that the month is to be reckoned exclusively of the days on which the bill is delivered and the action brought. *Blunt v. Heslop*, 8 Ad. & El. 577. In *Mitchell v. Foster*, 4 P. & D. 150, it was decided that the expression "ten days' notice at least" in a statute means ten clear days, exclusively both of the day on which proceedings are taken and of the day on which the cause arose.

¹ 13 & 14 Vict. c. 21.

² *Hipwell v. Knight*, 1 Y. & C. 401; *Parsons v. Chamberlain*, 4 Wend. (N. Y.) 512; *Stephens Bl.* (7th ed.) vol. i. 283; *Walker v. Clements*, 15 Q. B. 1046; *Castle v. Burdett*, 3 T. R. 623; *Rex v. Peckham*, Carth. 406; *Lacon v. Hooper*, 6 T. R. 224; *Rex v. Adderly*, Doug. 462. But in cases of lapse and *quare impedit*, calendar months are held to be intended, *Catesby's Case*, 6 Coke, 62; and such also is the rule there as to bills and notes, *Chitty on Bills*, 542.

³ *Dav. Prec.* (4d ed.) vol. ii. pt. 2, p. 863, note s.

⁴ *Brewer v. Harris*, 5 Gratt. (Va.) 285; *Hunt v. Holden*, 2 Mass. 170; *Avery v. Pixley*, 4 id. 460; *Strong v. Burchard*, 5 Conn. 357; *Mitchell v. Woodson*, 37 Miss. 567; *Sprague v. Norway*, 31 Cal. 173; *Kimball v. Lamson*, 2 Vt. 138; *Williamson v. Farrow*, 1 Bailey (S. C.) Const. 606; *Com. v. Shortridge*, 3 J. J. Mar. (Ky.) 638; *Com. v. Chambre*, 4 Dall. (Penn.) 143; *Glenn v. Hibb*, 17 Md. 260; *Bartol v. Calvert*, 21 Ala. 42; *Gross v. Fowler*, 21 Cal. 392; *Moore v. Houston*, 3 S. & R. 69. In New York the rule was otherwise as to its use in statutes, *Loring v. Hulling*, 15 Johns. (N. Y.) 119; *Parsons v. Chamberlain*, 4 Wend. (N. Y.) 512; but now, by statute, it is provided that it shall be construed to mean a calendar month, and not a lunar month, unless otherwise expressed. In Delaware, *State v. Jacobs*, 2 Harr. (Del.) 548, the term, as used in the statute limiting indictments against horse-racing, cock-fighting, &c., was construed to mean lunar months.

⁵ *Kelly v. Gilman*, 29 N. H. 385; *Tillson v. Bowley*, 8 Me. 163; *People v. Ulrich*, 2 Abb. (N. Y.) Pr. 28.

⁶ *Thomas v. Shoemaker*, 6 W. & S. (Penn.) 179; *Leffingwell v. White*, 1 Johns. Cas. (N. Y.) 99.

⁷ *Sheets v. Selden*, 2 Wall. (U. S.)

SEC. 56. **When Act is to be done "by" a Certain Day.** — When an act is to be done by the fifteenth day of any given month, it must be done and fully completed on the fourteenth, as it is construed as the intention and with the view of having the benefit of the act on the fifteenth, that that day is fixed upon.¹

SEC. 57. **Year.** — The word "year," when employed in statutes or any class of obligations, and no mention is made of any other system of reckoning, and there is nothing to indicate a different intention, is construed as meaning a year, according to the Christian calendar.² The rule may be said to be that the period of time intended to be designated by the time must be determined by the subject-matter and the context of the instrument or statute, and that signification given to it which accords with the intention of the party using it.³

177. In *Union Bank v. Forrest*, 3 Cranch (U. S. C. C.), 218, the term "month," as used in a bank charter, was held to mean calendar month. *Shapley v. Garey*, 6 S. & R. (Penn.) 539; *Hardin v. Major*, 4 Bibb (Ky.), 104. "For the space of one month after return-day," and "within one month from return day," are equivalent expressions. *Gore v. Hodges*, 7 T. B. Mon. (Ky.) 520.

¹ *Rankin v. Woodworth*, 3 Penn. 48. .

² *Engleman v. State*, 2 Ind. 91. Two years is equivalent to twenty-four months.

Hopkins v. Chambers, 7 T. B. Mon. (Ky.) 257.

³ *Thornton v. Boyd*, 25 Miss. 598. The term "one whole year," used in the Massachusetts act of 1793, c. 34, respecting settlements, was held to be a political, or rather a municipal, year; viz., from the time the officer is chosen until a new choice takes place, at the next annual meeting for the choice of town officers, which may sometimes exceed, and sometimes fall short of, a calendar year. *Paris v. Hiram*, 12 Mass. 262.

CHAPTER VI.

EQUITY, ADOPTION OF STATUTE BY COURTS OF.

SEC. 58. Adoption of Statute in Cases involving Concurrent Jurisdiction.

59. Rule as to purely Equitable Matters.

60. Stale Demands.

SEC. 61. Effect of Acquiescence.

62. Distinction between Laches and Acquiescence.

63. When Equity will supply Remedy upon a Claim barred by the Statute.

SEC. 58. Adoption of Statute in Cases involving Concurrent Jurisdiction. — Courts of equity, although not in all cases bound by the statute of limitations, unless expressly brought within its provisions, have nevertheless acted in this respect, in analogy to courts of law, and given effect to the statute¹ in all cases of concurrent jurisdiction;² and it may

¹ *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Thorp v. Thorp*, 15 Vt. 105; *Munson v. Halloway*, 26 Tex. 475; *Lewis v. Marshall*, 1 McLean (U. S.), 16; s. c. 5 Pet. (U. S.) 470; *Johnson v. Johnson*, 5 Ala. 90; *Callard v. Tuttle*, 4 Vt. 491; *Manchester v. Matthewson*, 3 R. I. 237. The statute of limitations, in Massachusetts, operates, in equity as well as at law, of its own force, and not by the courtesy or discretion of the courts. But direct

trusts, created by deed or will, and perhaps trusts existing by appointment of law, are not within reach of the statute. Constructive trusts, resulting from agencies, partnerships, and the like, are subject to the statute. Fraud in the defendant does not prevent the statute of limitations from barring a suit in equity, unless it be actual fraud, which was concealed, and which the party had no means of discovering, till within six years before the filing of the

² *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Phares v. Walters*, 6 Iowa, 106; *Young v. Mackall*, 3 Md. Ch. 398; *Teackle v. Gibson*, 8 Md. 70; *Hertle v. Schwartz*, 8 id. 366; *Knight v. Browner*, 14 id. 1; *Wilson v. Anthony*, 19 Ark. 16; *Hill v. Boyland*, 40 Miss. 618; *Goff v. Robbins*, 83 id. 153; *Perkins v. Cartnell*, 4 Harr. (Del.) 270; *Gunn v. Brantley*, 21 Ala. 633; *Crocker v. Clements*, 23 id. 296; *Keaton v. McGwier*, 24 Ga. 217; *Manning v. Warren*, 17 Ill. 267. In *Tiernan v. Rescariere*, 10 G. & J. (Md.) 217, the court held that, when relief sought in equity is not more comprehensive than that which might have been obtained at law for money had and received, the statutory bar is applied the same as it would have been at law. In a Kentucky case, *Breckenridge v. Churchill*, 3 J. J. Mar. (Ky.) 11, A. being indebted to B., a large part of the debt being for usury, A. and C. as surety gave their note to D., a creditor of B., receiving from B. a previous

note made by A. A. having failed, C. was compelled to pay the note. A. assigned to C. all his right to recover usurious interest from B. In a proceeding in equity to recover the usurious interest brought by C., it was held that as A. had lost his right to sue B. for the usury by lapse of time, C. stood in no better position in relation to the same, and that a court of equity, in matters where its jurisdiction was concurrent with courts of law, was equally bound by the statute. *Philadelphia, &c. Trust & Ins. Co. v. Philadelphia & Reading R. R. Co.*, 139 Penn. St. 534; *Herbert v. Herbert*, 47 N. J. Eq. 11; *Norris v. Haggin*, 136 U. S. 386; *White v. Pendry*, 25 Mo. App. 542; *Jaffrey v. Bear*, 42 Fed. Rep. 569; *Burgess v. St. Louis, &c. R. R. Co.*, 99 Mo. 496; *Jencks v. Quidnick Co.*, 185 U. S. 457; *Bates v. Gillett*, 132 Ill. 287; *Sanchez v. Don*, 23 Fla. 445; *North v. Platte Co.*, 29 Neb. 447; *Mining Co. v. Mining Co.*, 9 Col. 343; *Johnston v. S. Mining Co.*, 39 Fed. Rep. 321.

be said that in such cases a court of equity will no more disregard the

bill. A constructive trust is subject to the statute of limitations. So held, in case of a partner who, after the dissolution of the firm, had funds remaining in his hands, and accounts unsettled. *Fornam v. Brooks*, 9 Pick. (Mass.) 212. The statute limiting suits against executors to four years after the acceptance of their trust is a bar to a bill in equity, in cases where it bars a suit at law. *Burditt v. Grew*, 8 Pick. (Mass.) 108. It is a well-established rule in equity that the statute will bar an equitable right, where at law it would have operated against a grant. *Miller v. McIntyre*, 6 Pet. (U. S.) 61. Where, in settling a debt, a party paid \$3,000 in cash, and gave his note for the residue, the amount of both of which exceeded, by mistake, the amount of the debt \$1,000, it was held that a cause of action accrued immediately to the party making the payment to recover back the \$1,000; and that, where he made no effort to do so until after judgment was recovered against him on the note, when he filed a bill for relief to that extent against the judgment, an action at law to recover back the over-payment being then barred by the statute, the bill was also barred thereby. *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32. Although strictly these statutes do not extend to suits in equity, yet the courts acknowledge their obligation; and where the statute takes away the right of entry, or would bar an ejectment in twenty years, it will, by analogy, bar relief in equity, although time within which a writ of right or other real action might be brought. *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *People v. Everest*, 4 Hill (N. Y.), 7; *Reeves v. Dougherty*, 7 Yerg. (Tenn.) 222; *Hayden v. Bucklin*, 9 Paige (N. Y.) Ch. 512; *Long v. White*, 5 J. J. Mar. (Ky.) 231; *Ridley v. Hetman*, 10 Ohio, 524; *Saunders v. Catlin*, 1 D. & B. (N. C.) Eq. 95; *Cleaveland Ins. Co. v. Reed*, 1 Biss. (U. S. C. C.) 180; *Hovenden v. Annesley*, 2 Sch. & Lef. 329; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Moore v. Porcher*, 1 Bailey (S. C.), Eq. 195; *Hamilton v. Hamilton*, 18 Penn. St. 20; *Wood v. Wood*, 8 Ala. 756; *Cumming v. Berry*, 1 Rich. (S. C.) Eq. 114;

Leggett v. Coffield, 5 Jones (N. C.) Eq. 382; *Phalen v. Cook*, 19 Conn. 421. Though the statute does not apply in terms to proceedings in equity, yet such proceedings are affected by analogy to the statute, so that in general if the party be guilty of such laches, in pursuing his equitable title, as would bar him at law, he shall be barred in equity; but equity will remove the legal bar proceeding from lapse of time, as it would any other legal advantage, if sought to be used conscientiously. *Bond v. Hopkins*, 1 Sch. & Lef. 413. See *Barnesley v. Powell*, 1 Ves. 285; *M'Kenzie v. Powis*, 4 Bro. C. C. 328; *Pincke v. Thornycroft*, 1 id. 289, 4 Bro. P. C. 92; *Foxcraft v. Lyster*, 2 Vern. 456; *Colles*, 108; *Pulteney v. Warren*, 6 Ves. 73. But see *Duval v. Terry*, Show. 15. Where lands are devised in trust for payment of debts, the statute of limitations does not run after the death of testator, against debts not barred thereby at his death. *Fergus v. Gore*, 1 Sch. & Lef. 107; *Burke v. Jones*, 2 Ves. & B. 275. A plea of the statute by an executor was allowed where the testator died in 1786, but probate was not taken in 1802, the allegation of the bill, upon a fair construction, being, that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort* previously to 1792. *Webster v. Webster*, 10 Ves. 93. Non-payment of rent reserved on a lease, though for more than twenty years, will not bar the lessor from recovering possession at the expiration of the term. *Saunders v. Lord Annesley*, 2 Sch. & Lef. 106. There is no statute of limitations to bar a legal rent-charge; therefore in equity such a bar will not be permitted to prevail, but the demand may be excluded by presumption from length of time, and acquiescence. *Stackhouse v. Barnston*, 10 Ves. 467. *Collins v. Goodall*, 2 Vern. 235; *Eldridge v. Knott*, Cowp. 214; *Aston v. Aston*, 1 Ves. 264; *Cholmondeley v. Clinton*, 2 Jac. & W. 141; *Troup v. Smith*, 20 Johns. (N. Y.) 47; *Thomas v. White*, 3 Litt. (Ky.) 177; *Taylor v. McMurray*, 5 Jones (N. C.) Eq. 357; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; *Dean v. Dean*, 9 N. J. 425; *McCrea v. Purmort*, 16 Wend.

statute than a court of law.¹ Indeed, LORD REDESDALE, in an English

(N. Y.) 460; *Rhyn v. Vincent*, 1 McCord (S. C.) Eq. 310; *Murray v. Coster*, 5 Johns. (N. Y.) Ch. 522; *Kane County v. Herrington*, 50 Ill. 232; *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *Lansing v. Starr*, 2 id. 150; *Badger v. Badger*, 2 Cliff. (U. S. C. C.) 137; *Conover v. Conover*, 1 N. J. Eq. 403. Effect will be given to the statute of limitations in equity as well as at law in proper cases. *Lewis v. Marshall*, 1 McLean (U. S.), 16; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Lewis v. Marshall*, 5 id. 469; *Sharp v. Sharp*, 15 Vt. 105; *Collard v. Tuttle*, 4 id. 491; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *McCrea v. Purmort*, 16 id. 460; *Lansing v. Starr*, 2 Johns. (N. Y.) Ch. 150; *Murray v. Coster*, 20 Johns. (N. Y.) 576; s. c. 5 Johns. (N. Y.) Ch. 522; *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Conover v. Conover*, id. 403; *Watkins v. Harwood*, 2 Gill & J. 307; *Lingan v. Henderson*, 1 Bland (Va.), 236; *Harrison v. Harrison*, 1 Call (Va.), 419; *Ryan v. Parker*, 1 Ired. Ch. 89; *Mardre v. Leigh*, 1 Dev. (N. C.) Eq. 360; *Van Rhyn v. Vincent*, 1 McCord (S. C.) Ch. 310; *Cumming v. Berry*, 1 Rich. (S. C.) Eq. 114; *Moore v. Porcher*, 1 Bailey Ch. 195; *Johnson v. Johnson*, 5 Ala. 90; *Wood v. Wood*, 3 id. 756; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; *Shelby v. Shelby*, Cooke (Tenn.), 179; *McDowell v. Heath*, 3 A. K. Mar. 222; *Thomas v. White*, 3 Litt. (Ky.) 177; *Perry v. Craig*, 3 Mo. 316. And an allegation in the bill that the plaintiff has been prevented by fraud from asserting his claim is unavailing. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460. In cases of concurrent jurisdiction, courts of equity are bound by the statute equally with courts of law. And there are other cases, not of concurrent jurisdiction, where the statute is applied by way of analogy to the law. *Pratt v. Northam*, 5 Mas. (U. S. C. C.) 95. In prescribing the time within which a bill of review may be brought, a court of equity will adopt the analogy of the statute limiting the time within which an appeal may be taken to a decree. *Thomas v. Harvie*, 10 Wheat.

(U. S.) 146. A court of equity will give full effect to the statute of limitations, as well as throw out stale demands and claims; but when it perceives that the party complaining has equitable rights, and that the remedy at law might have proved to be insufficient; that the answer admits that they have never been relinquished, or compensation made for them, and that they still exist; and alleges that no resistance has been made to the enjoyment of them up to the time of filing the answer, — it will not refuse to give relief, being a case proper for it, although the claim has been outstanding for a long time. *Chapman v. Butler*, 22 Me. 191. It will not presume the extinguishment of an equity of redemption from lapse of time, where the person entitled is under any of the disabilities specified in the statute of limitations, *Wells v. Morse*, 11 Vt. 9. Nor does the statute constitute directly a defence to a bill in chancery; but the court will, in analogy to the statute, presume a settlement and payment from the lapse of the same time, if the presumption be not rebutted by evidence which satisfactorily accounts for the delay, and the case do not come within the exceptions of the statute. *Spear v. Newell*, 13 Vt. 288; *Mardre v. Leigh*, 1 Dev. (N. C.) Eq. 366; *Ryan v. Parker*, 1 Ired. (N. C.) Eq. 89; *Harrison v. Harrison*, 1 Call (Va.), 419; *Watkins v. Harwood*, 2 G. & J. (Md.) 107; *Lingan v. Henderson*, 1 Bland (Md.) Ch. 236; *Mitchell v. Woodson*, 37 Miss. 567; *Mandevill v. Lane*, 28 id. 312; *Borden v. Perry*, 20 Ark. 293; *Harris v. Mills*, 28 Ill. 44; *McDowell v. Heath*, 3 A. K. Mar. (Ky.) 222; *Shelby v. Shelby*, Cooke (Tenn.), 179; *Murphy v. Blair*, 12 Ind. 184; *Bailey v. Carter*, 7 Ired. (N. C.) Eq. 282; *Thomas v. Harvie*, 10 Wheat. (U. S.) 146; *Judah v. Brandon*, 5 Blackf. (Ind.) 506; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129; *Perkins v. Cartwell*, 4 Harr. (Del.) 270; *Lansing v. Star*, 2 Johns. (N. Y.) Ch. 150.

¹ *Bailey v. Carter*, 7 Ired. (N. C.) Eq. 282. A court of equity will give effect to the statute in all cases where the plaintiff could have brought an action at law for the same matter. *Goddell v. Kimmel*, 99

case,¹ before the adoption of the statute of Wm. IV., which expressly extends the statute to courts of equity, went so far as to hold that courts of

U. S. 201; *Mann v. Fairchild*, 2 Keyes (N. Y.), 106; *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266; *Clark v. Ford*, 3 Keyes (N. Y.), 370; *Stafford v. Bryan*, 3 Wend. (N. Y.) 532; *McCrea v. Purmort*, 16 id. 532; *Spoor v. Wells*, 3 Barb. (N. Y.) Ch. 199; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143; *Pratt v. Northam*, 5 id. 95; *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201. A plea of the statute of limitations was overruled upon letters produced, assigning reasons for declining to pay, and recommending plaintiff to bring an action, as amounting to a sufficient acknowledgment of the debt to take it out of the statute, upon the authorities, though against principle. *Baillie v. Sibbald*, 15 Ves. 185; *Baillie v. Lord Inchiquin*, 1 Esp. 435. Payment of a dividend under a commission of bankruptcy against one partner raises a new assumpsit by the other, depriving him of the benefit of the statute of limitations. *Ex parte Dewdney*, 15 Ves. 499. Before the statute of 4 Anne, c. 16, § 19, there were no exceptions in the statute of limitations in this country; and even since that time it has been held that the saving in that statute is not to be extended according to equity; for though the courts of justice may be shut up (*tempore guerræ*), so as that no original could be filed, yet the statute continues to run against a demand. *Beckford v. Wade*, 17 Ves. 93; *Aubry v. Fortescue*, 10 Mod. 206; *Hall v. Wybourn*, 2 Salk. 420. The statute of limitations is founded upon the soundest principles, and courts of equity are bound to adopt it where the legal and equitable title so far correspond, as that the only difference is, that the one must be enforced in this court, the other in a court of law. *MANNERS, C.*, in *Medlicott v. O'Donel*, 1 B. & B. 166. The statute does not bar a bill of revivor, after a decree to account, but it rests in the discretion of the court to give or refuse relief. *Egremont v. Hamilton*, 1 B. & B. 531; *Hol-*

lingshead's Case, 1 P. Wms. 742; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607. In *Sugar River Bank v. Fairbank*, 49 N. H. 139, *BELLOWS, C. J.*, in commenting upon the extent to which a court of equity will go in enforcing statutes of limitations, says: "As a general rule, courts of equity are bound by a statute of limitations equally with courts of law, and they cannot disregard the plain requirements of such statute; for that would be to repeal it. Even when the statute, in terms, applies only to actions at law, which are enumerated, courts of equity act in analogy to it, and refuse to grant relief in cases coming within its provisions. In the case of executors and administrators the limitations imposed by statutes are more stringently enforced than those of the general statutes of limitations, both at law and in equity; and it has been held that the omission to embody in the former statute the exceptions contained in the latter indicate the purpose to make the bar of suits against executors and administrators absolute." See also *Atwood v. Rhode Island Agricultural Bank*, 2 R. I. 191; *Walker v. Cheever*, 39 N. H. 420; *Judge of Probate v. Brooks*, 5 id. 82; *Cutter v. Emery*, 37 id. 567; *Ticknor v. Harris*, 14 id. 272; *Burdock v. Garrick*, L. R. 5 Ch. App. 234; *McCartee v. Camel*, 1 Barb. (N. Y.) Ch. 455; *Flood v. Patteson*, 29 Beav. 293; *Sibbering v. Balcarras*, 3 De G. & Sm. 735; *Downes v. Bullock*, 9 H. L. Cas. 1; *Wright v. Vanderplank*, 2 K. & J. 1; *Mills v. Drewitt*, 20 Beav. 632; *Portlock v. Gardner*, 1 Hare, 594. A claim by a creditor, against a legatee, to have the legacy refunded for payment of the debt, will be barred, in analogy to the statute of limitations, by a lapse of four years from the time when the insolvency of the executor was ascertained by a return of *nulla bona* to an execution against him. *Miller v. Mitchell*, 1 Bailey (S. C.) Ch. 437. The statute of Tennessee does not run to bar the recovery of a legacy from the executor,

¹ *Hovenden v. Annealey*, 2 Sch. & Lef. 629.

equity did not adopt the statute merely by analogy of, but in obedience to, the statute; and so generally did the English courts of equity follow the statute, that the enactment of the statute referred to was regarded as little more than giving a statutory sanction to a well-established rule of those courts.¹

The statute is regarded as a defence, as well in equity as in law, where it confers absolute rights upon the party seeking its benefits. Thus, it would be preposterous to suppose that, where the title to lands has become absolute in a person by an adverse possession of them for the statutory period, a court of equity is not bound to give effect to such title, as well as a court of law; and it may be safely said that, regardless of the question whether the statute is applied in express

in equity, there being no statute of that State giving a legal remedy. *McDonald v. McDonald*, 8 Yerg. (Tenn.) 145. Where, by statute, the action of assumpsit is limited to three years, and that of debt to six, a cause of action on which assumpsit or debt may be brought will not be barred in the form of debt under six years; and where a bill in equity is founded on the same cause of action, the limitation will be to six years. *Burdoine v. Shelton*, 10 Yerg. (Tenn.) 41. Where a party attempts to enforce in equity a claim, on which debt or assumpsit would lie, if he had sued at law, the limitation of the former action being three years, and that of the latter six years, it will be considered, in respect to the statute of limitations, as an action of debt. *Bedford v. Brady*, 10 Yerg. (Tenn.) 350. Twenty years' adverse possession succeeding an actual or virtual disseisin bars a suit in equity as well as at law, and three years added to such adverse possession, after infants, who hold a claim to land in controversy, have arrived at full age, bars their claim. *Gates v. Jacob*, 1 B. Mon. (Ky.) 306; *Dexter v. Arnold*, 3 Sum. (U. S.) 152; *Miller v. McIntyre*, 6 Pet. (U. S.) 61; *Coulson v. Walton*, 9 id. 62; *Lewis v. Marshall*, 5 id. 470; *Bowman v. Wathen*, 1 How. (U. S.) 189; *Rhode Island v. Massachusetts*, 15 Pet. (U. S.) 233; *Peyton v. Stith*, 5 id. 485; *Bank v. Daniel*, 12 id. 33; *Hayman v. Keally*, 3 Cranch (U. S. C. C.), 325.

¹ *Cholmondeley v. Clinton*, 2 Jac. & W. 56; *Hollingshead's Case*, 1 P. Wms. 743; *Edsell v. Buchanan*, 2 Ves. 83; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143. The true meaning of the statute of limitations,

as applied to titles to land, is, that the party should have twenty years, during which it should be open to him to assert his title, and failing to do so a court of equity can afford no relief to him; and in such cases the court acts not by analogy, but in obedience to those statutes, considering themselves bound thereby in all cases of legal titles and legal demands; and wherever the legislature has limited a period for law proceedings, courts of equity will deem themselves equally restricted in analogous cases. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630; *Smith v. Clay*, Amb. 645. So, with respect to the operation of the statute of limitations upon cases of trusts in equity, the distinction is, if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud, or the like, his possession is adverse, and the statute of limitations will run from the time that the circumstances of the fraud were discovered. *Hollingshead's Case*, 1 P. Wms. 742; *Lockey v. Lockey*, Prec. Ch. 518; *Booth v. Lord Warrington*, 1 Bro. P. C. 455; *Weston v. Cartwright*, Sel. Ch. Cas. 34; *South Sea Co. v. Wymondsell*, 3 P. Wms. 158; *Bicknell v. Gough*, 3 Atk. 538. Every new right of action in equity must be acted upon within twenty years after it accrues. *Smith v. Clay*, Amb. 645; *Floyer v. Lavington*, 1 P. Wms. 270; *Delorain v. Brown*, 3 Bro. C. C. 633; *Beckford v. Close*, id. 644; *Hercy v. Dinwoody*, 4 id. 257.

terms to courts of equity, it is in all cases, except where relief is sought on the ground of fraud, bound thereby, when the statute has conferred absolute rights upon a person, or when its jurisdiction over the subject-matter is only concurrent with that of courts of law.¹ The principal reasons for this analogous application of the statute in courts of equity are, that the evils resulting from great delay in enforcing equitable rights are equally as great as those resulting from delay in enforcing legal rights, and also because, unless courts of equity acted in analogy to these statutes in cases where a party has a choice of forums, the result would be that the effect and real end of the statute would be eluded.² But in cases where relief is sought upon the ground of fraud

¹ *Phalen v. Clark*, 19 Conn. 420. This doctrine is adopted in the United States courts, and in those courts it is held that, in all that class of cases in which courts of equity have concurrent jurisdiction with courts of law, they are bound by general statutes of limitation, in the same manner as courts of law, and act in obedience to the statute, and not merely in analogy to it. *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143; *Pratt v. Northam*, id. 95. See also *Union Bank of Louisiana v. Stafford*, 12 How. (U. S.) 327. The statute is a bar to an equitable right, when at law it would have operated against a grant. *Miller v. McIntyre*, 6 Pet. (U. S.) 61; affirming s. c., 1 McLean (U. S. C. C.), 85. So, too, they are applied by courts of equity, in all cases where at law they might be pleaded. *Coulson v. Walton*, 9 Pet. (U. S.) 62. Effect will be given to the statutes of limitations in equity as well as in law, and as well where the origin of the conflicting titles is adverse as in other cases. *Miller v. McIntyre*, 6 Pet. (U. S.) 61. Thus, where an actual adverse possession has continued for twenty years, it constitutes a complete bar in equity, wherever the same possession would operate at law to bar an ejectment. A court of equity considers an equitable claim to land as barred, when the right of entry is lost. The right to file a bill does not continue beyond that time, until the time for bringing a writ of right has passed. *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201; *Peyton v. Stith*, 5 id. 485; *Lewis v. Marshall*, id. 470; *Rhode Island v. Massachusetts*, 15 id. 233. In

obedience to this rule a bill claiming title to, and praying for the possession of, lands will be dismissed, if the complainant and those through whom he claims have taken no steps to assert their rights for thirty years; the land being all that time in the adverse possession of their defendants and their ancestor. The claim is barred by twenty years' adverse possession. *Pindell v. Mulliken*, 1 Black (U. S.), 585. So, too, within the peculiar jurisdiction of courts of equity, those courts, although not in strictness bound by statutes of limitation, act by analogy to it, and, in a proper case, apply, as an equitable rule, the limitation prescribed by the statute. *Sherwood v. Sutton*, 5 Mas. (U. S. C. C.) 143; *Pratt v. Northam*, id. 95; *Baker v. Biddle*, *Baldw.* (U. S. C. C.) 394. See also *Union Bank of Louisiana v. Stafford*, 12 How. (U. S.) 327. The power conferred by the statute laws of some of the States, upon courts of probate, to direct a sale of the real estate of an intestate for the payment of debts, must be exercised within a reasonable time after the death of the intestate; and gross neglect or delay on the part of the creditors for an unreasonable time ought to be held to be a waiver or extinguishment of it. Although this power is not within the purview of the statute of limitations, it is within its equity; and by analogy to the cases where a limitation has been applied to other rights, the reasonable period within which this power may be exercised ought to be limited to the same period which regulates rights of entry. *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

² *Roosevelt v. Marks*, 6 Johns. (N. Y.) Ch. 266; *Troup v. Smith*, 20 Johns. (N. Y.)

on the part of the defendant, the courts, in a proper case, depart from this rule, and will give relief, unless the plaintiff has been guilty of unreasonable laches in seeking his remedy in equity.¹

In an English case,² the plaintiff brought a bill in equity to recover a large sum of money which he had been induced to pay to the defendant under fraudulent representations from him that he had paid a large sum of money to bring about a marriage between the plaintiff and his wife. The marriage took effect, and the plaintiff, led by the continuous misrepresentations of the defendant, paid to him the money stipulated. Nine years after the money had been paid the original fraud and subsequent management to delude the plaintiff was discovered, and then it was ascertained that the defendant not only never had paid, but also that he never was bound to pay, a farthing on account of the marriage. To the bill the defendant set up the statute of limitations, and the questions propounded for argument were: First, whether an action at law could have been maintained to recover damages for the fraud; second, if it could, at what time did the cause of action accrue; and, third, whether, supposing the fraud had not been discovered until after the expiration of six years from the accruing of the cause of action, a court of equity, after that time, could give relief.³

83; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152.

¹ *Evans v. Bacon*, 99 Mass. 218.

² *Booth v. Warrington*, 1 Bro. P. C. 445.

³ This case has been followed by numerous cases involving the same question. *Sherwood v. Sutton*, 5 Mas. (U. S.) 143. LORD REDESDALE, in the case of *Bond v. Hopkins*, 1 Sch. & Lef. 429, declared that where a title exists at law and in conscience, and the effectual exertion of it at law is unconscientiously obstructed, relief should be given in equity. And the same judge, in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 634, says, "that the reason why the statutes of limitation in case of the defendant's fraud ought not to prevail in a court of equity, is, that the conscience of the party, being so affected, he ought not to be allowed to avail himself of the length of time." In *Cholmondeley v. Clinton*, 2 Jac. & W. 141, it was held, that, in case of an equitable estate, "the statute of limitations would be a bar where there has been no fraud;" and in *Troup v. Smith's Exrs.*, 29 Johns. (N. Y.) 47, SPENCER, C. J., says, in allusion to the before-mentioned doctrine of LORD REDESDALE, "This is very intelligible

and sound doctrine, in a court of equity;" and that courts of equity are perfectly right in saying "that a party cannot in good conscience avail himself of the statute, when by his own fraud he had prevented the other party from coming to a knowledge of his rights." In the case of *Sherwood v. Sutton*, 5 Mas. (U. S.) 143, the same doctrine is very distinctly and fully recognized, and is said to apply as well to cases in which the jurisdiction of courts of law and equity is concurrent, as to such as are exclusively of equitable cognizance. The Supreme Court of the United States, in *Michoud v. Girod*, 4 How. (U. S.) 561, in discussing this subject, say: "In a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief in the lifetime of either of the parties upon whom the fraud is proved." The *First Massachusetts Turnpike Co. v. Tidd*, 8 Mass. 201, was an early and well-considered case, and has been noticed and approved by many other cases in this country, in which the Chief Justice says: "If this knowledge is fraudulently concealed from the plaintiff by the defendant, we should violate a sound principle of law if we permitted the defendant to avail

The court held that the bill was maintainable upon the ground that courts of equity would relieve a party against the consequences of the defendant's fraud, even though the remedy is barred at law. And now, in many of the statutes, express provision is made in favor of parties in cases where the cause of action has been fraudulently concealed, and even in States where no such exception exists it is held that, even at law, the statute does not begin to run until the fraud is discovered.¹

Fraud, in order to constitute an exception to the statute, must be the fraud of the party setting it up; and the statute of limitations relating to executors, &c., if it can be avoided by any fraud, can only be avoided by a fraud of the executors themselves, and not of third persons, with whom they have no privity. And where an administrator who was charged with fraud had deceased, and his sureties were also dead, the legatees must commence their suit against the representatives of the deceased within the three years provided by the statute. It seems that if fraud is to be set up to a bar of the statute, it must be stated in advance in the bill, so that the fact may be put in issue.²

In New York, it is expressly provided that the statute shall in all cases apply to courts of equity, where that court has concurrent jurisdiction over the subject-matter with courts of law, but not in cases where such courts have exclusive jurisdiction over the subject-matter. In cases where relief is sought on the ground of fraud, the relief must be sought within six years from the time of its discovery; and if relief is sought in a case involving a trust which is not cognizable by a court of law, it must be brought within ten years after the cause of action accrued, except that, if the party seeking relief was under any of the disabilities provided for in the statute when the cause of action accrued, the period during which such disability existed is not to be reckoned.³ The statute of Nevada, which embraces all "civil actions," is held to extend to and embrace equitable as well as legal actions, and courts of equity are held to be bound by the statute in all cases equally with courts of law.⁴ In Indiana, it is held that the statute providing that actions for relief against fraud shall be brought within six years after the cause of action accrued applies as well to suits in equity as to actions at law.⁵ In New York, the courts held that under the statute referred to a suit in equity must be brought within ten years from the time when the right accrued, in all cases where the proceeding is to enforce a right not cognizable at law;⁶ and the same rule ap-

himself of his own fraud." See also, to the same effect, *Weller v. Fish*, 3 Pick. (Mass.) 74; *Bishop v. Settle*, 3 Me. 405; *Homer v. Fish*, 1 Pick. (Mass.) 435; and *Jones v. Conway*, 4 Yeates (Penn.), 109, where the same rule was adopted in actions at law.

¹ See chapter on FRAUD.

² *Pratt v. Northam*, 5 Mas. (U. S.) 95.

³ See Appendix, New York.

⁴ *White v. Sheldon*, 4 Nev. 280.

⁵ *Pilcher v. Flinn*, 30 Ind. 202.

⁶ *White v. Methodist Church*, 3 Lana. (N. Y.) 477; *Elward v. Delfendorf*, 5 Barb. (N. Y.) 398; *Lindsay v. Hyatt*, 4 Edw. Ch. (N. Y.) 497; *Spoor v. Wells*, 3 Barb. Ch. (N. Y.) 199. In England, by

plies in cases where the jurisdiction is concurrent, but the legal remedy is imperfect or inadequate.¹ Thus, it has been held that this section of the statute applies to an action to redeem a mortgage by a person having a right to redeem, but who was not made a party to the foreclosure proceeding,² to actions for a specific performance of a contract,³ to reform a contract,⁴ to subject land to the payment of the testator's debts,⁵ to redeem stock or other personal property pledged as collateral for a debt,⁶ or indeed to any purely equitable action not involving a question of fraud, in which latter case it comes under the six years' clause, and the code has made no essential change in this respect.⁷

But, as we have observed, independent of any express statute to that effect, courts of equity adopt the statutes of limitation and apply them in all proper cases, and will refuse relief upon stale demands and claims, even though the statute has not run upon them, except where a reasonable excuse is presented for delay. But when it perceives that the party has equitable rights, and that a court of law might have proved insufficient to protect them, it will not in a proper case refuse relief, even though the claim has been long outstanding;⁸ and espe-

sec. 17 of 3 & 4 Wm. IV. c. 27, a period of forty years is fixed as the extreme limit within which any proceedings may be taken. Notwithstanding this, a sixty years' title is still necessary, and the rule which requires a vendor to give it, in the absence of conditions to the contrary, remains unaltered. "One ground of this rule," remarks LYNDHURST, L. C., "was the duration of human life, and that is not affected by the statute." *Cooper v. Emery*, 1 Phill. C. C. 388. The seventeenth section, just referred to, was decided to be retrospective in *Corbyn v. Bramston*, 3 Ad. & El. 63. But the question seems not to be free from doubt, as the words are perhaps in strictness prospective and different from those in some other sections, the twenty-sixth, for example; and in the learned note to *Nepean v. Loe*, in 2 Smith's L. C. 662, it is suggested that the question may be still open.

¹ *Clarke v. Boorman*, 18 Wall. (U. S.) 493; *Rundle v. Allison*, 34 N. Y. 180; *Mann v. Fairchild*, 14 Barb. (N. Y.) 548.

² *Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, 50 id. 468.

³ *Peters v. Delaplaine*, 49 N. Y. 362.

⁴ *Oakes v. Howell*, 27 How. Pr. (N. Y.) 145.

⁵ *Wood v. Wood*, 26 Barb. (N. Y.) 356.

⁶ *Roberts v. Sykes*, 30 Barb. (N. Y.) 173.

⁷ In *Montgomery v. Montgomery*, 3 Barb. (N. Y.) Ch. 132, an action to annul a marriage on the ground of fraud was held to be embraced under the six years' clause; so in *Borst v. Corey*, 15 N. Y. 505, an action to enforce an equitable lien for the purchase-money of lands, or indeed to any case where fraud is alleged and relied upon.

⁸ *Chapman v. Butler*, 23 Me. 191. In matters of account, even where they are not barred by statute, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost. *McKnight v. Taylor*, 1 How. (U. S.) 161. But mere lapse of time will not defeat equitable relief when time is not essential to the substance of the contract, and the party seeking relief has acted fairly, though negligently, unless the delay has been so long as to justify a presumption that he had abandoned the contract. *Getchel v. Jewett*, 4 Me. 350. But these statutes, being statutes of repose, suspend the remedy, but do not cancel the debt; and although equally available as a defence at law and

cially do they make an exception in the case of direct technical trusts, and fraudulent concealment of the cause of action.¹ Nor will the statutory bar be applied in equity, so long as an action at law will lie upon the instrument upon which the equitable action is predicated.²

The statute is applied in equity in matters of account,³ to actions to remove a cloud upon a title,⁴ to actions to foreclose mortgages,⁵ or title bonds,⁶ or for the specific performance of contracts;⁷ and generally courts of equity will adopt the statute in analogy to the nature of the claim sought to be enforced, and, as will be seen in the following section, where there is no analogous statute, as where the matter is purely equitable, the court will refuse relief, if the plaintiff has been guilty of laches in asserting his rights, and a demand will often be regarded as stale, even though the time which has elapsed is less than the statutory period.⁸

This doctrine is adopted in the United States courts, and it is there

in equity, yet where there are two securities for the same debt, one of which is barred by the statute and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter. Where the security for a debt is a lien on property, personal or real, that lien is not impaired in consequence of the debt's being barred by the statute of limitations. Therefore, where a debt due from A. to B. was secured by a promissory note, made by B. in April, 1817, payable in five years, and by a mortgage of real estate, executed by B. at the same time, but the note was never in fact paid, and B. had no property except the estate mortgaged, on a bill of foreclosure brought by A. in January, 1835, it was held that he was not barred of his right as mortgagee, and the relief sought was decreed. In such case, the finding of a debt due from B. to A., as the basis of a decree of foreclosure, would not preclude B. from availing himself of the statute of limitations, in a subsequent action on the note. *Belknap v. Gleason*, 11 Conn. 160.

¹ *McLain v. Ferrell*, 1 Swan (Tenn.), 48.

² *McNair v. Ragland*, 1 Dev. (N. C.) 533; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Wood v. Ford*, 29 Miss. 57.

³ *Mann v. Fairchild*, 3 Abb. (N. Y.) App. Dec. 152; *Hubbell v. Sibley*, 50 N. Y. 468; *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417.

⁴ *Hodgden v. Gutting*, 58 Ill. 431.

⁵ *Cleaveland Ins. Co. v. Reed*, 1 Biss. (U. S. C. C.) 180; *Anderson v. Baxter*, 4 Oregon, 105; *Hall v. Denckler*, 28 Ark. 506.

⁶ *Day v. Baldwin*, 34 Iowa, 380. The statute has been held applicable in equity in the following instances: In proceeding to set aside a judgment on account of fraud, *Moon v. Baum*, 58 Ind. 194; an action to enforce a mortgage, *Eubanks v. Leveredge*, 4 Sawyer (U. S. C. C.), 274; to redeem from a mortgagee, *Smith v. Foster*, 44 Iowa, 442; to vacate a judgment on the ground of fraud, *School District v. Schreiner*, 46 id. 172; to impeach the validity of a decree for a divorce *a mensa et thoro*, *Bourlan v. Waggaman*, 28 La. An. 481; to annul a mortgage on the ground of fraud, *Renshaw v. Herbert*, 29 id. 285; to annul a contract on the ground of lesion, *Blake v. Nelson*, id. 245; to restore a record in a suit to enforce a contract, *Wyatt v. Sutton*, 10 Heisk. (Tenn.) 458; to reopen an account, *Spruill v. Sanderson*, 79 N. C. 466; to enforce the liability of stockholders for the debts of a corporation, *Godfrey v. Terry*, 97 U. S. 171; or for the division of lands and profits thereof, *Harlaw v. Lake Superior Iron Co.*, 41 Mich. 588; or to recover for lands taken under legislative authority, *Sommer v. Pacific R. R. Co.*, 4 Mo. App. 586; or to recover in any instance where the complainant has or ever had a remedy at law, *Cleaveland v. Williamson*, 57 Ala. 402.

⁷ *Brennan v. Ford*, 46 Cal. 7.

⁸ *Spaulding v. Farwell*, 70 Me. 17.

held that in all that class of cases in which courts of equity have concurrent jurisdiction with the courts of law, they are bound by the general statutes of limitations in the same manner as courts of law, and act in obedience to the statute, and not merely in analogy to it.¹

And it is held that the statute is a bar to the equitable right when at law it would have operated against a grant.²

So, too, they are applied by courts of equity in all cases where at law they might be pleaded,³ and effect is given to the statute of limitations in equity the same as in courts of law, and as well where the origin of the conflicting titles is adverse as in other cases.⁴ Thus, where an actual adverse possession had continued for twenty years, it was held to constitute a complete bar in equity wherever the same possession would operate at law to bar an ejectment, upon the ground that a court of equity considers an equitable claim to land is barred when the right of entry is lost. The right to file a bill does not continue beyond that time, until the time for bringing a writ of right has elapsed.⁵

In obedience to this rule, a bill claiming title to and praying for the possession of lands will be dismissed if the complainant and those through whom he claims have taken no steps to assert their rights for thirty years; the land being during all that time in the adverse possession of their defendants and their ancestor.⁶

In the United States court it is held, that while within the peculiar jurisdiction of the courts of equity, those courts, although not in strictness bound by the statute of limitations, act by analogy to it, and in a proper case apply, as an equitable rule, the limitation prescribed by the statute.⁷

The power conferred by the statutes of some of the States upon courts of probate, to direct a sale of the real estate of an intestate for the payment of debts, must be exercised within a reasonable time after the death of the intestate; and gross neglect or delay on the part of the creditors for an unreasonable time ought to be held to be a waiver or extinguishment of it. Although this power is not within the purview of the statute, it is within its equity; and by analogy to the cases where a limitation has been applied to other rights, the reasonable period within which this power may be exercised is limited to the same period which regulates rights of entry.⁸

¹ *Bank of the United States v. Daniels*, 12 Pet. (U. S.) 32; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143; *Pratt v. Northam*, id. 95. See also *Union Bank of Louisiana v. Stafford*, 12 How. (U. S.) 327.

² *Miller v. McIntyre*, 6 Pet. (U. S.) 61, affirming s. c. 1 McLean (U. S. C. C.), 85.

³ *Coulson v. Walton*, 9 Pet. (U. S.) 62.

⁴ *Miller v. McIntyre*, 6 Pet. (U. S.) 61.

⁵ *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201; *Peyton v. Stith*, 5 id. 485; *Lewis*

v. Marshall, id. 470; *Rhode Island v. Massachusetts*, 15 id. 233.

⁶ *Pindell v. Milliken*, 1 Black (U. S.), 585.

⁷ *Sherwood v. Sutton*, 5 Mas. (U. S. C. C.) 143; *Pratt v. Northam*, 5 id. 95; *Baker v. Biddle*, Baldw. (U. S. C. C.) 394. See also *Union Bank of Louisiana v. Stafford*, 12 How. (U. S.) 327.

⁸ *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

When a party by his own fraud has prevented the other party from coming to a knowledge of his rights, he cannot, in good conscience, avail himself of the statute; and if necessary a court of equity will relieve the party upon whom the fraud was practised, and this is the case where the jurisdiction of the courts of law and equity are concurrent, as where a court of equity has exclusive jurisdiction.¹

In a case in the Supreme Court of the United States,² the court says: "In a case of actual fraud we believe no case can be found in the books in which a court of equity has refused to give relief in the lifetime of either of the parties upon whom the fraud is proved."

In a Massachusetts case,³ the Chief Justice says: "If this knowledge is fraudulently concealed from the plaintiff by the defendant, we should violate a sound principle of law if we permitted the defendant to avail himself of his own fraud."⁴

In England, by the statute of William IV., chapter 27, a period of forty years is fixed as the extreme limit within which any proceedings may be taken. Notwithstanding this, a sixty years title is still necessary, and the rule which requires a vendor to give it in the absence of conditions to the contrary, remains unaltered. One ground of this rule was the duration of human life, and that is not affected by the statute.⁵

The seventeenth section of the act referred to has been held to be retrospective.⁶ But the question seems not to be free from doubt as the words are, perhaps, in strictness, prospective and different from those in some other sections. And in a note to *Nepean v. Loe*, in 2 Smith's Leading Cases, 662, it is suggested that the question may be still open.

In a New York case,⁷ an action to annul a marriage on the ground of fraud was held to be embraced within the six years' clause; and in a later case, in the same State,⁸ an action to enforce an equitable lien for the purchase-money of lands, or, indeed, to any case where fraud is alleged and relied upon, the same rule is adopted. In matters of account, even where they are not barred by statute, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice where the original transactions have become obscure by time, and the evidence is lost.⁹ But mere lapse of time will not defeat equitable relief when time is not essential to the substance of the contract, and the party seeking relief has acted fairly, though negligently, unless the

¹ *Sherwood v. Sutton*, 5 Mas. (U.S.) 143.

² *Michoud v. Girod*, 4 How. (U. S.) 561.

³ *Turnpike Co. v. Tidd*, 3 Mass. 201.

⁴ See also, to the same effect, *Weller v. Fish*, 3 Pick. (Mass.) 74; *Bishop v. Settle*, 3 Me. 405; *Homer v. Fish*, 1 Pick. (Mass.) 435; and *Jones v. Conway*, 4 Yeates (Penn.), 109, where the same rule was adopted in actions at law.

⁵ *Cooper v. Emery*, 1 Phill. C. C. 388.

⁶ *Corbyn v. Bramston*, 3 Ad. & El. 63.

⁷ *Montgomery v. Montgomery*, 3 Barb. N. Y. Ch. 132.

⁸ *Borst v. Corey*, 15 N. Y. 505.

⁹ *McKnight v. Taylor*, 1 How. (U. S.) 161.

delay has been so long as to justify a presumption that he had obtained the contract.¹ But these statutes, being statutes of repose, suspend the remedy, and do not cancel the debt; and although equally available as a defence at law and in equity, yet where there are two securities for the same debt, one of which is barred by the statute and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter. Where the security for a debt is a lien on property, personal or real, that lien is not impaired in consequence of the debt being barred by the statute of limitations. Thus, where a debt due from A. to B. was secured by a promissory note, made by B. in April, 1817, payable in five years, and by a mortgage of real estate, executed by B. at the same time, but the note was never in fact paid, and B. had no property except the estate mortgaged, on a bill of foreclosure brought by A. in January, 1835, it was held that he was not barred of his right as mortgagee, and the relief sought was decreed. In such a case the finding of a debt due from B. to A., as a basis of a decree of foreclosure, would not preclude B. from availing himself of the statute of limitations, in a subsequent action on the note.²

The statute has been held applicable in equity in the following instances: In proceedings to set aside a judgment on account of fraud;³ in an action to enforce a mortgage;⁴ to redeem from a mortgagee;⁵ to vacate a judgment on the ground of fraud;⁶ to impeach the validity of a decree for a divorce *a mensa et thoro*;⁷ to annul a mortgage on the ground of fraud;⁸ to annul a contract on the ground of lesion;⁹ to restore a record in a suit to enforce a contract;¹⁰ to reopen an account;¹¹ to enforce the liability of stockholders for the debts of a corporation;¹² for the division of lands and profits thereof;¹³ or to recover for lands taken under legislative authority;¹⁴ or to recover in any instance where the complainant has or ever had a remedy at law.¹⁵

SEC. 59. **Rule as to purely Equitable Matters.** — As to matters of equitable cognizance merely, unless in express terms it is made applicable thereto, the statute does not apply.¹⁶ In other words, the

¹ *Gretchel v. Jewett*, 4 Me. 350.

² *Belknap v. Gleason*, 11 Conn. 160.

³ *Moon v. Baum*, 58 Ind. 194.

⁴ *Eubanks v. Leveredge*, 4 Sawyer (U. S. C. C.), 274.

⁵ *Smith v. Foster*, 44 Iowa, 442.

⁶ *School District v. Schreiner*, 46 Iowa, 172.

⁷ *Bourlan v. Waggaman*, 28 La. An. 481.

⁸ *Renshaw v. Herbert*, 29 La. An. 285.

⁹ *Blake v. Nelson*, 29 La. An. 245.

¹⁰ *Wyatt v. Sutton*, 10 Heisk. (Tenn.) 458.

¹¹ *Spruill v. Sanderson*, 79 N. C. 466.

¹² *Godfrey v. Terry*, 97 U. S. 171.

¹³ *Harlow v. Lake Superior Iron Co.*, 41 Mich. 583.

¹⁴ *Sommer v. Pacific R. R. Co.*, 4 Mo. App. 586.

¹⁵ *Cleaveland v. Williamson*, 57 Ala. 402.

¹⁶ *Marsh v. Oliver*, 14 N. J. Eq. 259; *Attorney-General v. Purmort*, 5 Paige (N. Y.) Ch. 620; *Warner v. Daniels*, 1 W. & M. (U. S. C. C.) 91. The court will not apply the statute of limitations to a demand purely of an equitable nature, *Singleton v. Moore*, Rice (S. C.) Ch. 110. An action barred at law, is barred in equity,

statute is not binding on courts of chancery in cases of exclusively equitable cognizance. But the court often refuses to interfere where there have been gross laches or a long or unreasonable acquiescence in the assertion of adverse claims, and adopts, in cases to which the statute does not strictly apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law.¹ But

Butter v. Johnson, 111 N. Y. 204; *Switzer v. Noffsinger*, 82 Va. 518; *Metropolitan Natl. Bank v. St. Louis Dispatch Co.*, 36 Fed. Rep. 322; *Diefenthaler v. New York*, 111 N. Y. 331; *Humphrey v. Carpenter*, (Minn.) 39 N. W. 67, and courts of admiralty are bound to apply the statute where there is nothing exceptional in the case. *Southard v. Brady*, 36 Fed. Rep. 560; *Nesbit v. The Amboy*, 36 Fed. Rep. 925.

¹ *Askew v. Hooper*, 28 Ala. 634. In matters purely equitable, if there is an analogy between it and a remedy at law, the court will generally apply the same limitation. Thus, a grantor's bill alleging that the conveyance was in fact made as a security for money loaned, and charging that the grantee had sold the land for a much greater sum than the indebtedness, and praying an account for the difference, was held to be barred in the same period that an action for a debt would be at law. *Hancock v. Harper*, 86 Ill. 445. The statute cannot be pleaded by trustees, in defence of a charge of a breach of trust, or the consequences of neglecting their duty in having sold an estate incumbered, without satisfying that demand. *Milnes v. Cowley*, 4 Price, 103. In *Cholmondeley v. Clinton*, 2 Mer. 173, 357, the defendant's father, conceiving himself entitled in remainder, under the words of a limitation, upon the death of the particular tenant, had entered into the possession of the equity of redemption of certain estates, which were then in mortgage. On his death defendant entered as heir-at-law, and after twenty-one years' uninterrupted possession in the two, plaintiff claimed the right of redemption, alleging a want of title in defendant's father; defendant set up the length of time. But GRANT, M. R., held that the statute of limitations could not operate; that though there was a possession of twenty years, it was not in the character of owner of the legal estate, and

that, without something tantamount to a disseisin, there could be no bar; that the subsistence of the mortgage in this case rendered the estate an equitable one, and that of an equitable estate there could be no disseisin. On this cause, however, coming on for further directions, PLUMER, M. R., overruled the former decision, and after reviewing the cases where length of time has been considered a bar in equity, stated the effect of them to be, first, that courts of equity have at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands, where the party has slept upon his right, and acquiesced for a great length of time; and, secondly, that whenever a bar has been fixed by statute to the legal remedy in a court of law, the remedy in a court of equity has, in the analogous cases been confined to the same period. He then stated it to be clear, that, had the present been the claim of a legal estate in a court of law, the remedy would have been barred by the statute of limitations. It was therefore clear, that being an equitable estate, the remedy must, by analogy, be equally barred in a court of equity. s. c. 2 Jac. & Walk. 1, 151. On appeal to the Lords the decree of PLUMER, M. R., was affirmed, LORD ELDON stating his opinion to be, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as disseisin, abatement, or intrusion, with respect to legal estate. s. c. id. 191. As to the decisions that a direction by will, to pay debts, took away the plea of the statute of limitations, there is a distinction between debts on simple contract and bond; the principle as to the former is, that the debt may have existence and the remedy be taken away, but the bond debt goes upon the presumption of payment. Per ELDON, C., in *Ex parte Roffey*, 19 Ves. 470.

where the claim is purely equitable, unless expressly so provided, the statute does not apply thereto, and the lapse of time, however long, will not deprive a party of his remedy thereon if there is a reasonable excuse for the delay;¹ as the court will not allow a just claim to be defeated simply because of the lapse of time, if the party has not, in view of the circumstances, been guilty of unreasonable delay.² Thus, in an Illinois case,³ it was held that a bill to foreclose a mortgage will not be barred on the ground of staleness even after the lapse of thirty-five years, when it is shown that the mortgagor has been out of the State most of the time, and had apparently abandoned his equity of redemption, and the mortgagee has constantly asserted his claim by the sale of part of the premises, paying the taxes on the remainder, and other acts of ownership, and no adverse claim had been asserted until about a year before the bill was brought.⁴

In cases where the jurisdiction of equity is concurrent with courts of law, that is, when a right is sought to be enforced in equity for which the party has a remedy at law, it would operate as a virtual repeal of the statute, if parties by a change of forum could evade its effect; and for this reason there is much justice in the statement of CATRON, J.,⁵ that courts of equity are no more exempt from these statutes than courts of law.⁶ But this cannot be said to be the case where the rights sought to be enforced are merely matters of equitable jurisdiction, because the ill results likely to ensue in the former case cannot ensue in this, and also because this class of claims cannot be said to be within the spirit or intent of these acts, unless expressly embraced therein; and in such cases the rights of parties are enforced without reference to the statute, unless from lapse of time and neglect in seeking their enforcement they have become stale;⁷ and the arguments advanced in some of the cases, that as the statute of James was in force when our statutes were enacted, and that the legislatures well understood the manner in which the courts

¹ *Pitzer v. Burns*, 7 W. Va. 63; *Askew v. Hooper*, 28 Ala. 634; *Keaton v. McGwier*, 24 Ga. 217; *Burden v. Stein*, 27 Ala. 104; *Union Bank v. Stafford*, 12 How. (U. S.) 327; *Wood v. Ford*, 29 Miss. 57.

² But in such cases the burden is on the plaintiff to show a reasonable excuse for delay. *Pierce v. McClellan*, 93 Ill. 245. In *Cherry v. Lamon*, 58 Ga. 541, it was held that where bank-notes have been sued upon in due time, and judgments thereon recovered, a bill to bring in equitable assets and subject them to the judgments for the satisfaction thereof is not governed by the periods of limitation that would be applicable if the bank-notes, instead of the judgment, were the foundation of the bill.

³ *Locke v. Caldwell*, 91 Ill. 417.

⁴ See also *Johnson v. Diversey*, 82 Ill. 446; *Calwell v. Miles*, 2 Del. Ch. 110; *Preston v. Preston*, 95 U. S. 200; *Neely's Appeal*, 85 Penn. St. 387.

⁵ *Bank of United States v. Daniel*, 12 Pet. (U. S.) 56.

⁶ See to same effect *Piatt v. Vattier*, 9 Pet. (U. S.) 416; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *Bowman v. Wathen*, 2 McLean (U. S. C. C.), 876; *Hakins v. Barney*, 5 Pet. (U. S.) 457; *Coulton v. Walters*, 4 id. 62; *Robinson v. Hook*, 4 Mas. (U. S. C. C.) 139; *Baker v. Biddle*, 1 Bald. (U. S. C. C.) 419; *Miller v. McIntyre*, 6 Pet. (U. S.) 61.

⁷ *Lawrence v. Trustees*, 2 Den. (N. Y.) 577; *Rockwell v. Servant*, 54 Ill. 251.

of equity in England had considered that statute, affords a strong presumption that the legislature intended to bind courts of equity by them, as well as courts of law,¹ is far-fetched and fallacious, as these statutes are to be construed strictly, being in derogation of vested rights, and are not to be extended by implication to cases or causes of action not fairly embraced within the terms of the language employed; and it is generally held by our courts that, except in the single case of concurrent jurisdiction, courts of equity may act in analogy to the statute or not, as the ends of justice and the strict equity of the case seems to require. Indeed, it often occurs that a court of equity refuses relief upon the ground that the party seeking it has slept upon his rights until they have become stale, even though the statute has not run thereon.² But this is only in rare and exceptional instances, where the party can be said to have acquiesced in the wrong of which he complains, and generally a right will not be regarded as lost by staleness by a period less than that provided for the limitation of analogous cases at law,³ nor even then,⁴ if the delay is reasonably explained.⁵ In an Illinois case this proposition was well illustrated. In that case the administratrix of a deceased partner filed a bill soon after his death against the surviving partner for an account of the partnership funds. The civil war broke out soon after, and the complainant being a resident of one of the disloyal States could not have ready communication with her counsel, and the defendant, who resided in the county where the suit was pending, did nothing to bring the cause to a hearing, and no steps were taken therein from 1862 to 1869. In the latter year the defendant died, and the complainant revived the suit against his personal representatives, and from that time up to the fire of October, 1871, in Chicago, the suit was actively prosecuted, and the record had become very voluminous, when it was destroyed by that fire. It being found impossible to supply that record, the suit was dismissed, and another suit instituted, being in reality a revival of the former suit, the dismissal having been made to avoid the difficulties arising from the inability of the parties to supply the lost record. The court held that there were no such laches on the part of the complainant as deprived her of a standing in a court of equity.⁶ There are also a class of cases covering another ground

¹ *Farnam v. Brooks*, 9 Pick. (Mass.) 242; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 168.

² *Hunt v. Ellison*, 32 Ala. 173; *Hamlin v. Mebane*, 1 Jones (N. C.) Eq. 18; *Ferson v. Sanger*, 1 Davies (U. S. C. C.), 252; *Kerby v. Jacobs*, 13 B. Mon. (Ky.) 435; *Wilson v. Anthony*, 19 Ark. 16.

³ *Dugan v. Gittings*, 3 Gill (Md.), 138; *Reed v. West*, 47 Tex. 240.

⁴ *Warner v. Daniels*, 1 W. & M. (U. S.) 90; *Calwell v. Miles*, 2 Del. Ch. 110;

Neely's Appeal, 85 Penn. St. 387; *Preston v. Preston*, 95 U. S. 200.

⁵ *Johnson v. Diversy*, 82 Ill. 446.

⁶ In *Reed v. West*, 47 Tex. 240, it was held that a court of equity would call on courts of law during the suspension of the statute by the civil war, and would not, except for some equitable reason, hold a party who had neglected to attempt an enforcement of his rights during this period as guilty of such laches as would deprive him of equitable relief.

that refute the idea that courts of equity are absolutely bound by the statute of limitations in matters of purely equitable cognizance. Thus, in England, it has been held that, where a party applies to a court of equity and carries on an unfounded litigation, protracted under circumstances and for such a length of time as to deprive his adversary of his legal rights, a court of equity will supply a substitute therefor, and administer it within its own jurisdiction so as to effectuate the legal right upon which the statute has run ;¹ and this is hardly consistent with the theory that these courts regard themselves as absolutely bound by the statute ; although it is proper to say that the exercise of this power is not favored in courts of equity in this country, and it is hardly believed that, strictly, it ever should be exercised, unless the party has been enjoined from bringing an action at law, and the statute makes no provision for saving his rights, in which case a court of equity should, where it can do so, enforce his rights.

SEC. 60. **Stale Demands.** — Courts of equity have always discouraged stale demands, by refusing to enforce them, where the person setting it up has lost his moral, if not his legal, right to enforce them ;² and the question as to whether a demand is stale or not is one which depends so largely upon the nature of the claim and the peculiar circumstances of each case, that no general rule can be given that will afford a decisive test. The fact that a party has delayed the enforcement of his right for the statutory period is *prima facie* sufficient ; but even this is not decisive, as, if there is a sufficient excuse for delay, the court will en-

¹ *Pultney v. Warren*, 6 Ves. 73 ; *Bond v. Hopkins*, 2 Sch. & Lef. 630 ; *East India Co. v. Champion*, 11 Bligh, 158 ; *Grant v. Grant*, 2 Russ. 598.

² *Spaulding v. Farwell*, 70 Me. 17 ; *Dickerman v. Burgess*, 20 Ill. 266 ; *Stokes v. Lebanon, &c. Turnpike Co.*, 6 Humph. (Tenn.) 241 ; *Edings v. Whaley*, 1 Rich. (S. C.) Eq. 301 ; *Marshall v. Means*, 12 Ga. 61. A court of equity will not aid parties who have slept on their rights, *Johnson v. Johnson*, 5 Ala. 90 ; *Piatt v. Vattier*, 9 Pet. (U. S.) 405 ; *Coleman v. Lyne*, 4 Rand. (Va.) 454 ; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717 ; as where he has permitted a party to occupy his lands adversely for the statutory period, even though he did not know the fact, but might have ascertained it by reasonable diligence in looking after his rights. *Bowman v. Wathen*, 1 How. (U. S.) 189. A demand which has been suffered to lie for thirty years, during which the principals have died, is regarded as stale, and equity will not enforce it. *Randolph v. Ware*,

3 Cranch (U. S.), 603. In *Rogers v. Sanders*, 16 Me. 350, it was held that where the binding efficacy of a contract has been lost by lapse of time, equity will grant relief if time is of the essence of the contract. But that where the party asking performance has been guilty of laches, and offers no satisfactory reason for it, and the other party has not waived or acquiesced in it, no relief can be granted ; nor will it be granted where the remedies are not mutual, and where the party not bound lies by to see whether it will prove a gaining or losing bargain, and acts accordingly.

De Grann v. Mechan (N. J.), 2 Att. 193. In *Stevens v. Union Trust Co.*, 57 Hun (N. Y.), 498, it was held, that so long as a legal right remains, equity will grant relief unless there has been delay or acquiescence amounting to a recognition of the rights of the adverse party. See also *Dunne v. Stottsburg*, 26 Pac. Rep. (Cal.) 333 ; *Brush v. Manhattan R. R. Co.*, 26 Abb. N. C. (N. Y.) 73.

force the right.¹ And, on the other hand, delay for less than the statutory period may render the demand stale, within the meaning of the term as employed in equitable parlance.² In an English case,³ the court

¹ *Preston v. Preston*, 95 U. S. 200; *Neeley's Appeal*, 85 Penn. St. 387; *Reed v. West*, 47 Tex. 240; *Rogan v. Walker*, 1 Wis. 631; *Lawrence v. Rokes*, 61 Me. 38; *McKnight v. Taylor*, 1 How. (U. S.) 161. Where an executor of a partner deceased after a partial settlement with the survivor of the firm lies by for seventeen years and makes no claim until the survivor has deceased, and until much of his evidence has been lost, it was held that, in the absence of a reasonable excuse for the delay, he could not bring a bill for account against the representative of the deceased. *Codman v. Rogers*, 10 Pick. (Mass.) 112. See *Mitchell v. Lenox*, 1 Edw. (N. Y.) Ch. 428, where an assignee for the benefit of creditors assigned the trust property to other trustees with the assent of the creditors, and the debtor made no objection thereto, an acquiescence of eighteen years was held to preclude him from an equitable remedy. In *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417, a partner to whom an account had been presented by his co-partner, who retained it for thirteen years without objection, was held to be concluded by his acquiescence from seeking to have the accounts adjusted in equity. In *Powell v. Murray*, 10 Paige (N. Y.) Ch. 256, it was held, where an agreement for the compromise of doubtful claims had been acquiesced in for thirty-eight years, and those who were competent to explain the transaction were dead, that a party to that agreement who sought to invalidate it must show beyond all question that the agreement was improperly obtained, and was without consideration.

² *Spaulding v. Farwell*, *ante*; *Harrison v. Gibson*, 23 Gratt. (Va.) 212. In *Lawrence v. Rokes*, 61 Me. 38, where a bill in equity was brought to adjust the accounts of a partnership, and it appeared that by the laches of the complainant the respondents had lost their evidence, or were placed in a disadvantageous position, it was held that the court would deal with

the remedy as though barred by the statute, although the statute had not in fact run upon the claim. It was also stated that, conversely, where peculiar circumstances justified delay, relief would be granted although the statute had run upon the claim.

In *In re Neilley*, 95 N. Y. 382, it appeared that by the will of his father, A. and others were directed to pay a specified legacy to his sister S. In 1828, A. gave to S., who was then married, a written instrument by which he acknowledged himself to have in possession and to hold in trust for her the sum of \$268, which was stated to be the balance of the legacy then due her, upon which sum he promised to pay legal interest as long as the same remained in his hands, and to advance to her as required a portion of the principal, it having been agreed, as the instrument stated, between A. and the husband of S., that the money should remain in the hands of A. in trust for her and for her sole benefit. The husband of S. died in 1840; she died in 1842, leaving a daughter, W., then about thirteen years of age. A. died in 1877. W. in 1878 took out letters of administration upon the estate of her mother, and as administratrix preferred a claim against the estate of A. for the sum stated in said instrument, with interest from its date. Held, that the claim was barred by the statute of limitations; that, as A. was in fact the debtor of S., he could not change the character of his obligation by his own declaration, nor could any agreement on the part of S. constitute him a trustee instead of debtor, as under the law as it then stood she was disabled from making such an engagement because of her coverture; that the agreement, therefore, that the money should remain in trust was made with the husband alone; it affected only his interest in the debt and ceased upon his death, and thereupon S., as creditor by virtue of the original indebtedness, became entitled at once to payment, and the

³ *Harcourt v. White*, 28 Beav. 303.

refused relief to a reversion for waste, although the bill was brought two days before the lapse of the statutory period, on the ground that under the circumstances he had been guilty of unreasonable laches. On the other hand, in another case,¹ a decree was made thirty-eight

statute then began to run. And also that, assuming that S. might have elected to adopt the agreement made by her husband and to treat A. as trustee, this would not change the result, as, when a party has a concurrent remedy in equity and in law, time is an absolute bar in equity as it is in law.

S., from the time of the execution of the paper until her death, resided in the family of A., apparently having no property. W., also, after the death of her mother, lived in the family of A. up to her marriage in 1855. She testified that she found the paper in her mother's trunk after her death; it did not appear that she made any claim by reason of it against A. during her life. Held, that assuming the case was one solely of equitable cognizance and that the statute was not a defence, it was a stale demand which equity would not entertain; also, that the legal presumption of payment applied.

Payne v. Gardiner, 29 N. Y. 146; *Boughton v. Flint*, 74 id. 476; *Bean v. Tonnele*, 94 id. 381, distinguished.

¹ *Duke of Leeds v. Amherst*, 20 Beav. 239. See also *Morris v. Morris*, 4 Jur. N. S. 964. In *Varick v. Edwards*, 1 Hoff. (N. Y.) Ch. 382, it was held to be a general rule that the lapse of twenty years operates as a bar to a suit in equity connected with the recovery of land, and that where a party has resorted to a court of law, where his remedy lay in equity, or *vice versa*, he cannot be protected against the time so lost. But when time is set up as a conclusive bar, it will only be treated as such when there is an adverse possession; and a party setting up a false title under which he is protected in possession cannot set up that possession as a bar to a person who legally has the right. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity. *McKnight v. Taylor*, 1 How. (U. S.) 161; *Bowman v. Wathen*, id. 189; *Wagner v. Baird*, 7 id. 234; *Maxwell v. Kennedy*, 8 id. 222; *Ferson v. Sanger*, 1 W. & M. (U. S. C. C.) 138; s. c. Dav.

252; *Cleveland Insurance Co. v. Reed*, 6 Am. L. R. 406. Equity will not interfere in favor of one who has been guilty of gross laches; a complainant must use legal diligence in the enforcement of his rights. *Hollingsworth v. Fry*, 4 Dall. (U. S.) 347; *McKnight v. Taylor*, 1 How. (U. S.) 161; *Bowman v. Wathen*, id. 189; *Wagner v. Baird*, 7 id. 234; *West v. Randall*, 2 Mas. (U. S. C. C.) 181; *Perkins v. Currier*, 3 W. & M. (U. S. C. C.) 70; *Ferson v. Sanger*, Dav. (U. S. C. C.) 252; *Gordon v. Kerr*, 1 Woolw. (U. S. C. C.) 322; *Longworth v. Taylor*, 1 McLean (U. S. C. C.), 395; *Lewis v. Baird*, 3 id. 57. Thus equity will not give relief to parties claiming under a marriage settlement, who, being under no disability, have slept upon their rights for more than thirty years; especially against executors who have acted in good faith. *De Lane v. Moore*, 14 How. (U. S.) 253. Even in case of asserted fraud a court of equity will not grant relief if the plaintiff has been guilty of gross laches. *Gould v. Gould*, 3 Story (U. S.), 516; *Veazie v. Williams*, 8 How. (U. S.) 134; *Hough v. Richardson*, 3 Story (U. S.), 660; *Fisher v. Boody*, 1 Curt. (U. S. C. C.) 206. After the lapse of sufficient time to afford an equitable bar, the court will not grant relief, though the plaintiffs, being residents of another State, had no actual notice of the infringement of their rights. *Bowman v. Wathen*, 1 How. (U. S.) 189; *Wagner v. Baird*, 7 id. 234. In *Livingston v. Salisbury Ore Bed*, 16 Blatchf. (U. S. C. C.) 549, a bill was brought against a corporation to compel it to issue fifty shares of stock to the complainant. The property interest upon which this stock was issued was a bed of iron-ore. The complainant claimed under a will made by H., who died in 1872. H. had enjoyed no benefit from the property for fifty years before he died. No demand had ever been made for the stock until made by the complainant in 1874. Other persons had openly enjoyed and claimed title to the fifty shares ever since 1844, and during the whole fifty years H. was in a position

years after the waste was committed, *SHADWELL, V. C.*, announcing the principle which controls actions for relief in such cases to be "that the author of the mischief is not to complain of the result of it," and he cites Matthew xxvi. 52, and Ovid,¹ in support of it. Generally, it may be said to be an invariable rule that courts of equity will not grant relief to a party who, in view of the circumstances of the case, has been guilty of gross laches, and that parties are required to use reasonable diligence in the enforcement of their rights.²

In a case in the United States Supreme Court,³ FULLER, J., says: "The doctrine of laches is based upon the grounds of public policy, which requires for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith, and reasonable diligence."⁴

to know that his property, if he had any, was claimed by others. The court held that the complainant was precluded from relief on the ground of the laches and acquiescence of H. In an Illinois case, *Kellog v. Wilson*, 89 Ill. 357, a bill was brought to set aside an administrator's sale of real estate made eight years before, on the ground that the purchaser had been guilty of fraud in procuring persons not to bid against him. Seven years after the bill was filed, it was amended by setting up as a further ground of relief that the sale was made by an agent in the absence of the administrator. The court held that as to the first ground the court would not set aside a judicial sale in a case where there had been so great a delay, unless a clear case was made out by satisfactory proof, and that, in either case the plaintiff had been guilty of such laches as to disentitle him to relief. See also *Marshall v. Perry*, 90 id. 289.

¹ "Neque enim lex aequior ulla quam necis artifices arte perire sua." *Ars Amat.* lib. iv. 655. The application of the statute of limitations in courts of equity in England to all analogous matters was made at an early period after such statutes went into effect, *Beckford v. Wade*, 17 Ves. 96; *Smith v. Clay*, 3 Bro. C. C. 30; *Bond v. Hopkins*, 1 Sch. & Lef. 413; and even before these statutes were enacted these courts refused relief upon stale demands, where a party had slept upon his

rights so long that their enforcement was likely to operate as a fraud upon the defendant, or upon other grounds would be inequitable. *Cholmondeley v. Clinton*, 2 Jac. & W. 1. But when a party has equitable rights it will not refuse relief, although the claim has been outstanding for a long time, if the reason for delay is such as not to defeat the party's claim to its enforcement upon the ground of laches or acquiescence. *Lunn v. Johnson*, 3 Ired. (N. C.) Eq. 70; *Mason v. Crosby*, 1 Davies (U. S. C. C.), 303; *Kimball v. Ives*, 17 Vt. 430; *Bancroft v. Andrews*, 6 Cush. (Mass.) 493.

² *Ellison v. Moffat*, 1 Johns. Ch. (N. Y.) 46; *Frost v. Coon*, 30 N. Y. 428; *Ray v. Bogart*, 2 Johns. Cas. (N. Y.) 432; *Calhoun's Appeal*, 39 Penn. St. 218; *Hawthorn v. Bronson*, 16 S. & R. (Penn.) 269; *Halsey v. Tate*, 52 Penn. St. 311; *Cadwallader's Appeal*, 57 id. 158.

³ *Mackall v. Casilear*, 137 U. S. 779.

⁴ *Jenkins v. Pye*, 12 Pet. (U. S.) 241; *McKnight v. Taylor*, 1 How. (U. S.) 161; *Godden v. Kimmell*, 99 U. S. 201; *Lansdale v. Smith*, 106 U. S. 391; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372; *Wilkinson v. Sherman*, 45 N. J. Eq. 413; *Speidel v. Henrici*, 120 U. S. 377; *Hanner v. Moulton*, 138 U. S. 486; *Cresse v. Myer*, 138 U. S. 525; *Underwood v. Dugan*, 139 U. S. 380; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 117; *Martin v. Gray*, 142 id. 230.

But in New York it has been held that, where no estoppel or acquiescence is shown, and the statute of limitations has not run at law, so that a legal remedy exists, a court of equity will not refuse relief on the ground of laches.¹

In New York, it is held, and we think justly, that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right.²

Thus in a case recently decided by the Court of Appeals,³ an action was brought in equity to restrain the defendants from further maintaining and operating an elevated street railroad on Sixth Avenue in the city of New York, adjacent to the plaintiff's property, which consisted of five vacant lots. The defendants commenced and completed the structure of its railroad between the months of January and July, 1878, and from the time of its completion to the commencement of the action in 1889, it had, either by itself or through its lessée, continued to maintain and operate an elevated steam railroad in front of and adjoining the plaintiff's premises. No proceedings were taken by the railroad to acquire the easements of the abutting owners in the avenue, or their consent to its construction. The plaintiff complained that by reason of the operation of such railroad in impairing the easements of light, air, and access to his premises he had been damaged, and demanded judgment for such damages, as well as a perpetual injunction against the defendants from further operating and maintaining their railroad in front of his premises. A trial was had at special term, and although

¹ *Platt v. Platt*, 58 N. Y. 646. And in a proper case relief will be granted although the statute has run, except where the statute is expressly applied to courts of equity. *Lawrence v. Rokes*, 61 Me. 38. A court of equity will refuse to interpose to relieve a party against an inadvertent omission to set up a certain defence where he has been guilty of unreasonable laches. *Wilson v. Wilson*, 2 Lea (Tenn.), 17; *Sargent v. Bigelow*, 24 Minn. 370. And in the case first cited above, three years' delay was held to amount to such laches as precluded relief. And a delay of six years has been held to be such laches, unexplained, as would justify the court in refusing to permit a complainant to file an amended bill setting up matters in existence when the original bill was filed. *Marr v. Wilson*, 2 Lea (Tenn.), 229. But a supplemental bill, setting up new matter accruing after the original bill was brought, may be filed three years after the original bill was filed, although the statute of limitations in such cases at law runs in two years. *Cheek v. Anderson*, 2 Lea (Tenn.), 194.

The doctrine of stale demands or laches does not apply to a legal title. *Beon v. Miller*, 11 S. W. (Tex.) 551. Nor is it applicable to a claim under a legal title in an action of trespass to try title. *Bullock v. Smith*, 10 S. W. (Tex.) 678; *Montgomery v. Noyes*, 11 S. W. (Tex.) 138; *Daniels v. Bridges*, 11 S. W. 121. It has no application to a legal title and does not apply to the claims of the true owner of land when set up by a person claiming under a tax deed, where the prerequisite steps to make it valid have not been taken. *Telfener v. Dillars*, 70 Tex. 189.

² *Chapman v. Rochester*, 110 N. Y. 273; *Tallman v. Metropolitan El. R. R. Co.*, 121 N. Y. 123; *Arnold v. Hudson River R. R. Co.*, 55 N. Y. 661; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Colrick v. Swinburne*, 105 N. Y. 503; *N. Y. Rubber Co. v. Rothery*, 107 N. Y. 310; *Haight v. Price*, 21 N. Y. 240; *Broistedt v. South Side R. R. Co.*, 55 N. Y. 220; *Campbell v. Seaman*, 63 N. Y. 568.

³ *Galway v. Metropolitan Elevated R. R. Co.*, 128 N. Y. 132.

the court declined to award pecuniary damages to the plaintiff, or render judgment granting relief by injunction unless the defendants should pay to the plaintiff, within a limited time, the sum of \$20,000 for the depreciation of the premises caused by the railway, and upon such demand being made require the plaintiff to execute to the defendants a conveyance of the easements, it was found that the plaintiff saw the railroad in the course of construction in front of his premises, and from time to time saw what the defendants were doing in respect thereto, and occasionally, as a passenger, rode upon it. He made no protest against the construction of the road and instituted no legal proceedings to enjoin its construction or operation prior to the commencement of this action, although it appeared that he subscribed money to pay for counsel to prevent the erection of the road. The defendants set up the statute of limitations as a defence, and also claimed that the plaintiff was estopped from maintaining his action by reason of his acquiescence in said railroad and its operation, and in his use thereof as a passenger. RUGER, C. J., in delivering the opinion of the court sustaining the judgment of the lower court, said: "We think it would be impossible to suspend this appeal without unsettling the established law of the State. It is in effect, an effort to exempt actions in equity from the operation of the well-settled principle that trespassers upon real property, affected by an unlawful structure or nuisance, are continuous in their nature and give successive causes of action from time to time as the injuries are perpetrated. The questions raised are answered by elementary principles established in this State by numerous reported cases. They are found in the two propositions that continuous injuries to real estate caused by the maintenance of a nuisance or other unlawful structure created separate causes of action, barred only the running of the statute against the successive trespasses, and the further principle that no lapse of time or inaction merely on the part of the plaintiff during the erection and maintenance of such structure, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages. . . . So long as such person continues to be the owner of property and liable to be injured in respect thereto, by the unlawful acts of others, he is entitled to invoke the protection of the fundamental law without regard to the lapse of time that may occur before the commencement of legal proceedings, provided the remedy is claimed within the statutory period of limitation, applicable to his right, or before adverse possession has barred his right to the property injured.¹ The cause of action, both at law and in equity, in such cases arises out of the trespasses committed, and is based upon the ownership of the property upon which the injuries are inflicted; and it is obvious that no cause of action can be barred while there is an outstanding legal

¹ *Uline v. N. Y. Cent. & H. R. R. Co.*, 105 N. Y. 503; *Coleman v. Metropolitan El. R. R. Co.*, 121 N. Y. 123. *Arnold v. Hudson River R. R. Co.*, 55 N. Y. 661; *Colrick v. Swin-*

cause of action for which the party has a legal remedy. The existence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but is also the foundation of the jurisdiction which equity courts possess in reference to the subject-matter. . . . That theory is concisely expressed by JUDGE EARLE in the case of Tallman, *supra*. It was there said that when the defendant begins to construct its railway in front of the plaintiff's lots he could have commenced an action in equity against it, and restrained it until it had made compensation to him for the rights and easements which it took from him, or until it had acquired them by condemnation proceedings. In that way he would, at least in the theory of the law, have been indemnified for all the damage he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time, he could have taken it at any time afterwards during his ownership of the lots with the same result. He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed, and then bring successive actions to recover damages to his lots caused by the construction, maintenance, and operation of the railway. . . . In as much as the equitable remedy depends upon other things than upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists, an equity court is open to aid in the enforcement of the legal claim. Where the trespass is of such a character that it may be discontinued at the operation of the wrong-doer, or, if continued, is susceptible of having legal sanction obtained for its continuance, it seems to our sense of right, that a wrong-doer should not be permitted to repeat his unlawful conduct, and should deprive the owner of any of the remedies which the law has provided for his protection. If it were otherwise the wrong-doer would be permitted to show the aggravated character of his own conduct as a defence to the action of the legal owner, and thus violate the rule of law as well as the plainest principles of equity. . . . The right to an injunction in a proper case in England and most of the States is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent an irreparable injury, internal litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by a proper tribunal. . . . The law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued.¹ Delay, amounting even to apparent negligence, may be explained, and under special circumstances, as where there is difficulty about the title, it does not amount to a bar to relief in equity.² So the lapse

¹ Krehl v. Burrell, L. R. 11 Ch. 40. 146; Henderson's Case, 78 N. Y. 423; Baldwin v. Caulkins, 10 Wend. (N. Y.) 170; Williams v. N. Y. Cent. R. R. Co., 16 N. Y. 111.

² King v. Morford, 1 N. J. Eq. 274; Nelson v. Carrington, 4 Munf. (Va.) 332; Aylett v. King, 11 Leigh (Va.), 486; Baker v. Morris, 10 id. 284; Glenn v. Hebb, 12 G. & J. (Md.) 271. A surety who, six

of twelve years without the payment of interest on a mortgage bond has been held not sufficient to bring it under the head of a stale demand.¹ But generally, except where the explanation of the delay is reasonable, a claim in equity must be exhibited within such a reasonable time that the court may do no injustice to the defendant; and where a bill was brought to recover a balance claimed to be due, and which could only be determined by an examination of accounts more than twenty-seven years old, the court dismissed the bill on the ground that the demand was stale.² So where a bill was brought against the representative of a deceased treasurer of a legally established lottery, to recover a balance of funds claimed to be in his possession at the time of his decease, and it appeared that the lottery was established in 1802, and that most of the funds had been expended by 1809, and that the treasurer died in 1817, and the bill was not brought until 1830, the court held that the demand was stale, and dismissed the bill.³

Upon the question of estoppel by acquiescence the court adopted the rule laid down in the former case before that court,⁴ where it was held that the doctrine of laches and acquiescence as a bar to an action through lapse of time is only applicable to equitable rights, and that as to legal rights, mere lapse of time before an action to enforce them is barred, is of no moment. Also that the silence and inaction of the plaintiff, while seeing the defendant committing the acts complained of, and spending large sums of money in completing them, constitutes no defence to an action for an injunction, no matter how long continued unless accompanied by circumstances amounting to an estoppel.⁵ But, as

years after the death of his co-surety, paid the debt, and nearly two years afterwards demanded contribution of the administrator of his co-surety, it was held that his claim was not barred, as the administrator had made no payments during that time except to himself, so that no injury could result to the estate from the delay. *Burrows v. M'Whann*, 1 Desau. (S. C.) 409. So where a judgment creditor allowed the judgment to lie dormant for ten years, and then revived it by *scire facias*, it was held that lapse of time was no bar to a bill filed by the judgment debtor for relief against the judgment. *Hill v. Jones*, 2 Dev. (N. C.) Ch. 101. See also *Lewis v. Brooks*, 6 Yerg. (Tenn.) 167.

¹ *Kirma v. Smith*, 3 N. J. Eq. 14.

² *Atkinson v. Robinson*, 9 Leigh (Va.), 393.

³ *Carruthers v. Trustees of Lexington*, 12 Leigh (Va.), 616.

⁴ *Ormsby v. Vt. Mining Co.*, 56 N. Y. 623.

⁵ It was held, in *Haight v. Price*, "that

no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of a grant or of license." JUDGE EARLE, in the *Campbell* case, said: "It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. . . . No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs within any rule laid down in any reported case. In *Viele v. Judson*, JUDGE FINCH, in speaking of the cases where acquiescence had been held a bar, says: "In all of these the silence operated as a fraud, and actually itself misled. In all, there was both the specific

previously stated, where there is a reasonable excuse for delay, length of time does not defeat equitable relief. Thus, where a wife married

opportunity and apparent duty to speak, and in all, the party maintaining silence knew that some one was relying upon that silence, and either acting or about to act as he would not have done had the truth been told." It was held in the *Broiestedt Case* that the possession by a railroad company of a highway, under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil, and cannot be said to be adverse to him. In *New York Rubber Co. v. Rothery*, the defendant had built expensive structures for manufacturing purposes, and diverted the water from a stream adjoining plaintiff's premises for the purpose of supplying power to his machinery. It was claimed that the plaintiff, by her silence during the period when this work was going on, was barred of her action for damages. JUDGE PECKHAM, writing in the case, says: "In this there was no element of an estoppel. To constitute it, the person sought to be estopped must do some act, or make some admission, with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or omission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." See also *McMurray v. McMurray*, 66 N. Y. 176.

But we have already referred to a sufficient number of cases in this court to show how uniformly and frequently we have adhered to the doctrine, where a legal right is involved, and upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, that the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defence to such an action. Such is also the doctrine, generally, of the elementary writers. 2 Pom. Eq. Jur., Sec. 817; Bigelow, Estoppel, p. 476 *et seq.* The same general principle has also been held in England. In the case of *Fullwood v. Fullwood*, L. R. 9 Ch. D. 176, FRY, J., says that "mere lapse of time unaccompanied by anything else, has, in my judgment, just as much effect and no more, in barring a suit for an injunction, as it has

in barring an action for deceit." And the head-note in *Re Maddever*, L. R. 27 Ch. D. 523, reads: "That, as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal rights; the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law." The Supreme Court of the United States has also laid down the same rule in the recent case of *Menendez v. Holt*, 128 U. S. 523, 32 L. ed. 528, where CHIEF JUSTICE FULLER, writing for the court, says: "Mere delays or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder. *Atty.-Gen. v. Eastlake*, 11 Hare, 205."

Even in a case where laches has been allowed to operate as a defence, the question is to be determined in the discretion of the court, upon all of the circumstances of the case. *Fullwood v. Fullwood*, *supra*. "The rule requiring promptness in soliciting the intervention of a court of equity is always addressed to the discretion of the court, and varies much according to the situation of the parties, the nature of the relief demanded, and the circumstances of the case. *Calhoun v. Millard*, 121 N. Y. 82, 8 L. R. A. 248; *Fullwood v. Fullwood*, *supra*; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578, 1 L. ed. 723; *Atwater v. Fowler*, 1 Edw. Ch. (N. Y.) 420, 6 L. ed. 194. What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right, without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors, and condemning them to suffer remediless

her husband in her infancy, but immediately on his death asserted her rights by suit, the court held that, although the bill was not brought until thirty-five years after the cause of her complaint accrued, her demand was not stale.¹ Lapse of time, in equity, is permitted to de-

wrongs. The fact that the defendants intended to make their structure permanent, or made it so in fact, constitutes no defence to the action. *Krehl v. Burrell*, L. R. 7 Ch. D. 551, on appeal, L. R. 11 Ch. D. 146."

The importance of the opinion of RUGER, C. J., is such, and his consideration of the questions involved is so thorough and exhaustive, that I give it entire so far as it depends upon questions of importance to the profession outside of the State of New York.

¹ *Tate v. Greenlee*, 2 Hawks (N. C.), 486. See also *Falls v. Torrence*, id. 490.

Balkham v. Woodstock Iron Co., 48 Fed. Rep. 648, it was held, that one who holds lands under a bad or defective legal title, but with an equitable right to the property, is not guilty of laches for delay in going into a court of equity to perfect his title. *Balkham v. Woodstock Iron Co.*, 43 Fed. Rep. 648; *Parker v. Shannon*, 27 N. E. (Ill.) 525; *Coffee v. Emigh*, 15 Col. 184; *White v. Patterson*, 139 Penn. 429.

A person who, without right, enters and occupies the land of another, cannot claim, by reason of anything he does upon it, and the owner's delay to oust him for a less time than the statutory period of limitation, estops the owner from seeking a remedy against him. *Wayzata v. Great Northern R. Co.*, 49 N. W. (Minn.) 205. A suit to set aside the defendants' title to land, and establish title in the plaintiffs, brought twenty-five years after the wrongful transfer complained of, and twenty years after knowledge of the wrong by the party under whom the plaintiffs claim, when the parties to such transfer are dead, and the land has increased in value, and the defendants, who have occupied the land, were not parties to or cognizant of the wrong, — is barred on the ground of laches. *Underwood v. Dugan*, 139 U. S. 380.

An unexplained delay of a year and a half in bringing an action to set aside an auction sale of lands on the ground of fraud and collusion to prevent competition

in bidding, is unreasonable and fatal to the action, although plaintiff avers that he had no knowledge of the fraud at the time of the sale. *Hammond v. Wallace*, 85 Cal. 522. One who has waited until the claims for the payment of which his ancestor's real estate was sold, have become barred by the statute of limitations, and refuses to state when he became informed of irregularities upon the sale of the property to pay them, cannot maintain a suit in equity to set aside such sale. *Murphy v. De France*, 15 S. W. (Mo.) 949, affirmed on rehearing in 16 S. W. 861.

A suit to set aside the sale of a land certificate, brought nearly thirteen years — more than the longest State period of limitation — after the sale, where the value of the land located thereunder has largely increased, and parties interested and witnesses have died, and no person now interested in the land is implicated in the fraud alleged as the ground of relief, is barred on account of laches. *Hanner v. Moulton*, 138 U. S. 486.

Delay by the complainant in the enforcement of remedies, involving a lapse of time during which conditions have been changed that cannot be reinstated, money has been expended in improvement of property, parties and witnesses have died, and indemnity has been imperilled or lost, is ground on which a court of equity will withhold relief. *De Grauw v. Mechan*, 20 Atl. (N. J.) 198.

Equity will not, after the statute of limitations has run against an action at law for contribution, relieve an heir who paid mortgages on the entire property without taking an assignment thereof and suing the co-heirs for contribution. *Rowden v. Murphy*, 20 Atl. (N. J.) 379.

In Missouri, the statute which bars actions at law, bars also proceedings in equity, except those which the statute expressly excepts; and courts cannot extend those exceptions so as to embrace cases not within the specific exceptions enumerated in the statute itself. *Hoester v. Sammelmann*, 101 Mo. 619.

In *Bushnell v. Bushnell*, 77 Wis. 435,

feat an acknowledged right only on the ground of raising a presump-

it was held, that an action by a surety who has paid more than his proportion of the debt, against his co-surety for contribution, is an action at law and governed by the statute of limitations applicable to such actions, and is not brought within the statute applicable to equitable actions by the fact that an equitable action may be maintained for contribution in a proper case.

The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale demands; and the mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded. *Mackall v. Casilear*, 137 U. S. 556.

Where the difficulty of doing entire justice by reason of the death of the principal witnesses, or because the original transactions have become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith, and reasonable diligence.

In determining the staleness of a claim or its equity, the court is not confined to the statutory period of limitation, but may refuse relief where the delay is less or greater than the statutory period. *Nepach v. Jones*, 26 Pac. (Oreg.) 569, 849.

Length of time alone is not the test of the staleness of a demand, but the question must be determined by the facts and circumstances of each case and according to right and justice. *Id.*; *Marcotte v. Hartman*, 48 N. Y. (Minn.) 767.

Parties ignorant of their rights cannot be charged with laches. *Hannon v. Hounihan*, 85 Va. 429.

Laches is not attributable to an infant, the law assuming that he was ignorant of his rights during his minority. *Putnam v. Tinkler*, 83 Mich. 628; *Spencer v. Jennings*, 139 Penn. 198.

The equitable principle of refusing relief upon stale claims may apply to a proceeding in equity against directors of a national bank, although there is no statutory provision which would apply to an action at law in such a case. *Welles v. Graves*, 41 Fed. Rep. 459.

Where the object of the suit is to what could be done at law, — as, recover possession of real estate, and the plaintiff is guilty of the laches which a court of equity regards equivalent to the statute of limitations, such unexplained delay is a bar to the suit. *Norris v. Haggin*, 186 U. S. 886.

But where the subject-matter of a controversy is the right to unpatented mining property, the uncertain and fluctuating character of the property will be considered in determining the question of laches. *Great West Min. Co. v. Woodmans of Alston Min. Co.*, 23 Pac. (Col.) 908.

The doctrine of stale demands applies even where a trust be involved. *Sanchez v. Dow*, 23 Fla. 445. The general rule in respect to express trusts, that where the trust relation has been repudiated, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, a court of equity will refuse relief on the ground of lapse of time, applies with greater force to a resulting trust. *De Mares v. Gilpin*, 24 Pac. (Col.) 568.

As a rule cases of trust constitute an exception to the rule as to laches only so long as the relation continues. *Clark v. Clough*, 65 N. H. 43.

Upon a patent being issued to a head-right claimant of lands, he is invested with the legal title in trust and for the benefit of one to whom he has previously conveyed the lands; and where the grantor has done nothing to repudiate the trust, the doctrine of laches or stale claim does not apply. *Robertson v. Du Bose*, 76 Tex. 1.

Where property held in trust for one for life with remainder to others, is sold in a proceeding to which the trustee and the life tenant are parties, the remaindermen have no right to raise any objection until the death of the life tenant. Therefore their failure to object before that time will not debar them from relief on the ground of laches. *Covar v. Cantelou*, 25 S. C. 35.

The general government may be barred from maintaining a suit on account of laches, where it would be inequitable as between man and man, in their dealing with each other, to permit the suit. *United States v. Dalles Military Road Co.*,

tion that the right has been abandoned, and this presumption will never prevail against opposing facts and circumstances outweighing it.¹

Where the existence of a trust has been fraudulently concealed for thirty-six years, a delay of six months before beginning a suit after the discovery of the fraud, was held not to amount to laches which would prevent a court of equity from giving relief.² Nor generally will relief be refused on the ground of laches, where the party had no knowledge of the existence of the fact that the trustee was disposed to deny the trust relation, and claim adversely,³ provided the facts entitled them to relief. But relief will be denied where the facts could have been discovered by the exercise of reasonable diligence: Thus, a delay for many years on the part of the stockholders and officers of a lessee railroad

41 Fed. Rep. 493. In a case in the circuit court, it was held, that a claim of the United States to forfeit a grant of lands for non-performance of conditions, is defeated as a stale claim by the lapse of eighteen years after the time for performance before the commencement of suit. *United States v. Wallamet V. & C. M. Wagon Road Co.*, 42 Fed. Rep. 851. But in *Redfield v. Parks*, 132 U. S. 289, when a contrary doctrine is held, the defence of stale claims is not available to persons in possession of lands without title. *Baker v. McFarland*, 77 Tex. 294.

The maker of a trust deed is barred by laches from maintaining a suit to reform it forty years after it was made, and nearly thirteen years after realizing its character, during which time all the parties concerned were growing old, and she knew the testimony to support it or impeach it must soon be lost. *Van Houten v. Van Winkle*, 20 Atl. (N. J.) 84. So in a case of fraud upon the part of an administrator, in which each of the defendants participated, a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit. *Bryan v. Kales*, 134 U. S. 126.

Since an action to enforce as a lien on land in the hands of a third person a note given for the purchase price thereof, is not barred until after the expiration of fifteen years, plaintiff's failure to sue until after thirteen years from the maturity of the note and the time it was assigned to him, during which time the maker was solvent, does not preclude a recovery on the ground of laches. *Lucy v. Hopkins*, 11 Ky. L. Rep. 907, 13 S. W. 518.

In the absence of an express contract or

charter providing that the seat of a college shall not be removed, the validity of a statute authorizing a removal cannot be attacked after an acquiescence of twenty-five years, on the ground that it impairs the obligations of a contract. *Bryan v. Board of Education*, 12 Ky. L. Rep. 12.

Five years' delay in bringing a suit to cancel a deed, which is then allowed to drag for two years, and is then dismissed, followed by ten years of absolute inaction, during which time the property has doubled or perhaps quadrupled in value, is a bar to a second suit. *Henry v. Suttle*, 42 Fed. Rep. 91.

A person cannot avoid a deed on the ground that it was executed under duress while he was under arrest for larceny, where he neglects to bring the suit for nearly three years and until after the prosecution against him for larceny is barred, during which time the property is sold to innocent purchasers, unless the delay is satisfactorily explained. *Eberstein v. Willets*, (Ill.) 24 N. E. 967.

A minor is not chargeable with laches for neglecting to bring suit during minority for personal injuries resulting from negligence. *Thurston v. Luce*, 61 Mich. 292.

¹ *Nelson v. Carrington*, 4 Munf. (Va.) 332; *Reardon v. Leary*, 1 Litt. (Ky.) 53; *Burkhead v. Coulson*, 2 D. & B. (N. C.) Ch. 77. The poverty of the plaintiff is not an excuse for delay. *Locke v. Armstrong*, id. 147; *Perry v. Craig*, 3 Mo. 316. But see *Mason v. Crosby*, 1 W. & M. (U. S. C. C.) 341.

² *Middaugh v. Fox*, 135 Ill. 344.

³ *Roby v. Colehour*, 135 Ill. 300.

company in objecting that its officers acted in bad faith in taking the lease at an excessive rent, was held not to be excusable on the ground that the amount was of no consequence to them so long as an assignee of the lease for a part of the term paid it as he had agreed.¹

A surety is not guilty of laches in instituting a suit to have a bond cancelled or reformed which, by mutual mistake, made him personally liable for the amount of a judgment, until an attempt is made to hold him personally liable for the amount of the judgment on the bond.²

In a Vermont case,³ it was held that the right to enforce an obligation for a life support is not barred by the mere neglect for any length of time to take the benefit of the provision. So where the pledgee of property had been guilty of a breach of trust, and held the property, which had largely increased in value, and the pledgor had previously instituted a suit to redeem, which was decided against him, it was held that a delay of more than five years in bringing an action to redeem the pledged property was not such laches as would deprive him of equitable relief.⁴

Where a party has been unreasonably dilatory or negligent in enforcing his rights, and shows no excuse for such laches in asserting them, courts of equity uniformly decline to assist him in their enforcement. In an English case in which the doctrine of laches was carefully considered,⁵ LORD CAMDEN, in delivering the opinion of the court, said: "A court of equity has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.⁶ And where the appeal upon its face shows that the plaintiff is not entitled to relief by reason of lapse of time and of his own laches, the objection may be taken by demurrer."⁷

It has been a recognized doctrine of courts of equity to withhold relief in all cases where the party seeking it has delayed for an unreasonable length of time in asserting his claim, and the proper rule of pleading would seem to be, that when the case stated by the bill ap-

¹ *Jessup v. Illinois, &c. R. R. Co.*, 43 Fed. Rep. 483; see also *Van Vleet v. Sledge*, 45 Fed. Rep. 743, where it was held, that reformation of an entry in books of account will not be decreed on a bill filed nine years after the transaction where the complainant could have known, and was presumed to have known, of the entry, and no explanation is given for the delay.

² *Griswold v. Hazard*, 141 U. S. 260.

³ *Coleman v. Whitney*, 62 Vt. 123.

⁴ *Gilmer v. Morris*, 43 Fed. Rep. 456.

⁵ *Smith v. Clay*, 3 Bro. Ch. 640, n.

⁶ *Hume v. Beale*, 17 Wall. (U. S.) 336; *Knight v. Taylor*, 1 How. (U. S.) 161; *Bowman v. Wathen*, 1 id. 189; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Sullivan v. R. R. Co.*, 94 U. S. 806; *Godden v. Kimmell*, 99 U. S. 201; *Bright v. Leger-ton*, 29 Beav. 60; *Badger v. Badger*, 2 Wall. 87.

⁷ *Lansdale v. Smith*, 106 U. S. 391; *Bank v. Carpenter*, 101 U. S. 567; *Maxwell v. Kennedy*, 8 How. 210.

pears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer.¹

SEC. 61. Effect of Acquiescence. — Courts of equity will also refuse to grant relief where a person has acquiesced in the exercise of a right by another, under such circumstances that he cannot equitably dispute the right, although his acquiescence has not existed for the statutory period. **LORD ELDON**² gives expression to the rule in such cases thus :

¹ **HARLAN, J.**, in *Lansdale v. Smith*, *ante*. Note 1, page 124.

² *Dann v. Spurrier*, 7 Ves. 231. The delay of a party, apprised of his right, and of its infringement, to assert it, for a period sufficient to bar an action at law, founded on the same right, will preclude him from relief in equity, especially if by such delay he has avoided a risk which otherwise he must have shared with the adverse party. Therefore, where a corporation for manufacturing purposes, being greatly embarrassed, in 1818, voted to sell, and in fact sold, its property to relieve itself from such embarrassment, but the sale, though without actual fraud, was so made as not to be valid, the plaintiff, a stockholder of the corporation, apprised of what had taken place, and informed that he might be admitted into a new association, embracing most of the members of the corporation, and possessing its property, under such sale, upon the same terms as they had been ; after this, the plaintiff made no claim until 1826, and brought no suit until 1828, when he sought relief by a bill in chancery, it was held that he had outstaid his time ; and the bill was dismissed, but without costs. *Banks v. Judah*, 8 Conn. 145.

Where a party has been guilty of unreasonable laches and acquiescence in seeking relief in a court of equity, he is precluded from any remedy in that jurisdiction. *Smith v. Clay*, 2 Ambl., 645 ; *Calhoun v. Millard*, 121 N. Y. 69 ; *Lyon v. Park*, 111 N. Y. 850 ; *Coit v. Campbell*, 82 N. Y. 509 ; *Alvord v. Syracuse Savings Bank*, 98 N. Y. 599 ; *Andrews v. Farmers L. & T. Co.*, 22 Wis. 298 ; *Meredith v. Sayre*, 32 N. J. Eq., 557 ; *Atty.-Gen. v. Del. & B. B. R. Co.*, 27 id. 1 ; *Atty.-Gen. v. N. Y. & L. B. R. Co.*, 24 id. 49 ; *Freemont Ferry v. Dodge Co. Com'rs*, 6 Neb. 18 ; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1 ; *Hentz v. Long Island R. Co.*, 18

Barb. 655 ; *Ninth Ave. R. R. Co. v. New York El. R. Co.*, 3 Abb. N. C. (N. Y.) 358 ; *Kincaid v. Indianapolis Nat. Gas Co.*, 124 Ind. 577 ; *Western Union Tel. Co. v. Judkins*, 75 Ala. 428 ; *Midland R. Co. v. Smith*, 113 Ind. 233 ; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & C. 784 ; *Wood v. Charing Cross R. Co.*, 33 Beav. 290 ; *Bigelow v. Los Angeles*, 85 Cal. 614 ; *Pottsgrove Twp. v. Pennsylvania & S. V. R. Co.*, 2 Montg. Co., L. Rep. 133 ; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366 ; *Pensacola & A. R. Co. v. Hackson*, 21 Fla. 146 ; *Logansport v. Uhl*, 99 Ind. 581 ; *Goodwin v. Cincinnati & W. W. Canal Co.*, 18 Ohio St. 169 ; *Meredith v. Sayre*, 32 N. J. Eq., 557 ; *Traphagen v. Jersey City*, 29 id. 206 ; *Pickert v. Ridgefield Park R. Co.*, 25 id. 316 ; *Erie R. R. Co. v. Del. L. & W. R. Co.*, 21 id. 283 ; *Morris & E. R. Co. v. Prudden*, 20 id. 530 ; *Baltimore & O. R. R. Co. v. Strauss*, 87 Md. 237 ; *Spencer v. Falls Turnp. R. Co.*, 70 id. 136 ; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426 ; *Osborne v. Mo. Pac. R. R. Co.*, 37 Fed. Rep. 830. But in New York, it is held, that a mere failure to institute proceedings to restrain or prevent the construction or continued operation of a railroad, cannot deprive an owner of the constitutional right to recover compensation for the taking of his property, and to enjoin the continuance of the wrongful act until such compensation shall be made unless the legal right is barred by the statute of limitations, or the defendant has in some legal manner acquired a title to the property taken, or unless the owner has by his acquiescence become estopped from asserting his claim. *Knox v. Manhattan El. R. R. Co.*, 58 Hun (N. Y.), 517 ; *Abendroth v. Manhattan El. R. R. Co.*, 122 N. Y. 1 ; *Ode v. Manhattan El. R. R. Co.*, 56 Hun (N. Y.), 199 ; *McMurray v. McMurray*, 66 N. Y. 176 ; *Powers v. Manhattan El. R. R. Co.*, 120

“This court,” says he, “will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement, a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw any objection in the way of his enjoyment.”¹ In another case,² LORD COTTENHAM said: “If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the right is in progress, he cannot afterwards complain. This,” says he, “is the proper sense of the word ‘acquiescence.’” But a person who has not complete knowledge of the facts cannot be said to acquiesce.³ “I do not see,” says TURNER, L. J.,⁴ “how a man can be said to have ac-

N. Y. 178; *Chapman v. Rochester*, 110 N. Y. 278; *Menendez v. Holt*, 128 U. S. 523; *McLean v. Fleming*, 96 U. S. 245. In *Menendez v. Holt*, FULLER, C. J., says: “Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant’s land, he had acquired by that negligence the right to cut down the remainder.” *Atty.-Gen. v. Eastlake*, 11 Hare, 205. Nor will the issue of an injunction against the infringement of a trade mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right. *Fullwood v. Fullwood*, L. R. 9 Ch. D. 176. Acquiescence to avail must be such as to create a new right in the defendant. *Rodgers v. Nowill*, 3 De Gex, M. & G. 614. Where consent by the owner to the use of his trade mark by another is to be inferred by his knowledge and silence merely, it lasts no longer than the silence from which it springs. It is in reality no more than a revocable license. DUER, J., in *Amoskeag Manufacturing Company v. Spear*, 2 Sandf. (N. Y.) 599; *Julien v. Hoosier Drill Co.*, 78 Ind. 408; *Taylor v. Carpenter*, 3 Story (U. S.), 458: “So far as the act complained of is completed, acquiescence may defeat the remedy on the

principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay in respect to which the elements of an estoppel could rarely arise. At the same time as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it. A court might hesitate as to the measure of relief where the use by others for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand.”

¹ See *Youst v. Martin*, 3 S. & R. (Penn.) 423.

² *Duke of Leeds v. Amherst*, 2 Phillips, 123.

³ *Marker v. Marker*, 9 Hare, 16. Laches cannot be imputed, where the party had no knowledge of the facts which constituted his ground of action, and this is the case, although the party might have ascertained the facts by due inquiry, if by any act of the defendant, or the circumstances, he had reasonably been lulled into security. If there have been gross laches, it is within the provision and indeed the duty of the court to deny relief. *Coon v. Seymour*, 71 Wis. 340; *Bausman v. Kelly*, 38 Minn. 197.

⁴ *Cooper v. Greene*, 3 De G., F. & J. 58. See also *Hall v. Noyes*, cited 3 Ves. 748; *Lord Selsey v. Rhoades*, 1 Bligh, N. S. 1; *Anonymous*, cited 6 Ves. 632; *Rudd v. Sewell*, 4 Jur. 882.

quiesced in that he does not know; and in cases of this sort I think that acquiescence implies full knowledge, for I take the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights and of all the material facts and circumstances of the case."

SEC. 62. Distinction between Laches and Acquiescence. — While the words "laches" and "acquiescence" are often used as similar in meaning, the distinction in their import is both great and important. Laches import a merely passive, while acquiescence implies active, assent; and while, where there is no statutory limitation applicable to the case, courts of equity would discourage laches and refuse relief after great and unexplained delay, yet where there is such a statutory limitation they will not anticipate it, as they may where acquiescence has existed.

Laches amount, in fact, only to that inferior species of acquiescence described in the following terms by KINDERSLEY, V. C.:¹ "Mere acquiescence (if by acquiescence is to be understood only abstaining from legal proceedings) is unimportant; where one party invades the rights of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive; unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations."² Mere lapse of time may, however, make the reopening of a matter unreasonable.³ Mere acquiescence will not be a bar in cases where there is an express trust. In another case,⁴ which seems to be an authority for this proposition, the trust property had been improperly conveyed, but not for value, to the predecessor in title of the defendant upwards of one hundred years before suit, and the plaintiff had discovered the facts eighteen years before taking proceedings; yet, on demurrer, it was held that the statute had no operation.

SEC. 63. When Equity will supply Remedy upon a Claim barred by the Statute. — When a party applies to a court of equity and carries on an unfounded litigation, — protracted under circumstances, and for a length of time which deprives his adversary of his legal rights, — a substitute for the legal right of which the party so prosecuting an unfounded charge has deprived him should be supplied and administered.⁵ And in instances where a court of equity can consistently do

¹ Rochdale Canal Co. v. King, 2 Sim. N. s. 89.

² These remarks are erroneously attributed to LORD CRANWORTH by LORD CHELMSFORD, in Archbold v. Scully, 9 H. L. Cas. 360.

³ Green's Case, L. R. 18 Eq. 428.

⁴ Brown v. Radford, W. N. 1874, p. 124. See also Campbell v. Graham, 1

R. & My. 453; Pitt v. Lord Dacre, L. R. 3 Ch. D. 295.

⁵ Pultney v. Warren, 6 Ves. 73; Bond v. Hopkins, 2 Sch. & Lef. 630; Grant v. Grant, 2 Russ. 598; East India Co. v. Campion, 11 Bligh, 158. Where a defendant in a suit at law has unjustly pleaded the statute of limitations, equity may, on that ground, refuse to the de-

so, it will grant relief. But there are limits even to the powers of a court of equity ; and in matters where the party has a remedy at law, it has no more power to set aside the statute than a court of law has. Nor have such courts the power to enjoin a party from setting up the statute in a case where he is legally entitled to its benefits, and the exercise of such authority would be an usurpation of authority wholly unwarranted.

As to the application of the statute in equity in cases involving trusts, see chapter on TRUSTS.

pendant, in his defence to the suit, the benefit of the statute. *Lunn v. Johnson*, 3 Ired. (N. C.) Ch. 70. But in *Walker v. Smith*, 8 Yerg. (Tenn.) 238, it was held that, where a purely legal demand has been barred by lapse of time, a court of equity has not power, on account of any supposed inequity, to enjoin the party from insisting on the statute of limitations in any action which may be brought for its recovery.

CHAPTER VII.

REMOVAL OF THE STATUTORY BAR. ACKNOWLEDGMENTS.

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| <p>SEC. 64. General Reasons for Judicial Exceptions.</p> <p>65. Historical View of the Law relating to Acknowledgments.</p> <p>66. Acknowledgments apply only to Assumpsit. Theory on which founded.</p> <p>67. Crucial Test. Rule in A'Court v. Cross.</p> <p>68. Present Theory.</p> <p>69. Express or Implied Refusal to pay.</p> <p>70. Essential Requisites of an Acknowledgment.</p> | <p>SEC. 71. Bare Acknowledgment.</p> <p>72. Promise to settle.</p> <p>73. Failure to deny Liability. Expressions of Regret, &c.</p> <p>74. Effect of Acknowledgment.</p> <p>75. Offer to pay in Specific Property.</p> <p>76. Promise not to plead the Statute.</p> <p>77. Conditional Acknowledgment.</p> <p>78. Hope to pay.</p> <p>79. By and to whom must be made.</p> <p>80. Offer to arbitrate, Recital in Deeds, &c.</p> <p>81. When Acknowledgment must be made.</p> |
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SEC. 64. General Reasons for Judicial Exceptions. — The statute of James, which is the foundation of all of our statutes of limitations, and which is virtually in force in several of the States, and practically in all of them with some exceptions, did not contain any exception in case of acknowledgments of indebtedness by the debtor, yet at an early day such an exception was read into the statute by the judges, and there is no instance of judicial legislation that is better sustained by both reason and justice than this. The true reason for these exceptions is to be found in the fact that the reason for a statutory bar utterly fails when a debtor from time to time admits the existence and justice of the debt, and the courts, without intending to thwart, but rather to give effect to, the true intention of the statutes, began at an early day to hold that where a debtor expressly promises to pay a pre-existing debt, or acknowledges its existence under such circumstances that a promise to pay it can be implied, the statute is suspended up to that date, and begins to run anew from the date of such new promise or acknowledgment. In other words, that under the circumstances named the debt is revived and put on foot for a new period of life, coextensive with the statutory provision. In all cases, however, where an acknowledgment is relied upon to renew a debt, it will be found that these requisites are indispensable : —

First. The acknowledgment must be in terms sufficient to warrant the inference of a promise to pay the debt ;

Second. It must be made to the proper person ;

Third. By the proper person ; and,

Fourth. With the proper formalities, where any are required by statute. And in the case of real property, in order to have any effect, it must be shown to have been made before time has finally run in favor of the person making it.

With these general rules in mind, less difficulty will be experienced in dealing with isolated questions under this head than would otherwise exist.

From the rules stated, it will be seen that, whatever abstruse theories may formerly have existed in reference to the principles upon which these statutes are predicated, or in reference to the presumptions arising therefrom, it is now well settled that no acknowledgment is sufficient to take a case out of the operation of the statute, unless it is of such a character that a new promise sufficient to revive the debt can be fairly drawn therefrom ;¹ and the theory upon which the courts proceed is,

¹ *Barlow v. Bellamy*, 7 Vt. 54 ; *Allcock v. Gwan*, 2 Hill (S. C.), 326 ; *Sands v. Gelston*, 15 Johns. (N. Y.) 511 ; *Cohen v. Aubin*, 2 Bailey (S. C.), 283 ; *Smallwood v. Smallwood*, 2 D. & B. (N. C.) 330 ; *Eckert v. Wilson*, 12 S. & R. (Penn.) 393. It must be distinct, and without question of its being due, or an intimation that it would not be paid. *Berghaus v. Calhoun*, 6 Watts (Penn.), 219 ; *Glein v. Ries*, id. 44 ; *Harrison v. Handley*, 1 Bibb (Ky.), 443 ; *Allen v. Webster*, 15 Wend. (N. Y.) 284 ; *Head v. Manners*, 5 J. J. Mar. (Ky.) 255. Therefore, an acknowledgment of the justice of a claim, without anything more, is sufficient to remove the statute bar ; but if the debtor, in connection therewith, says anything to indicate that although the claim is just, yet he does not intend to pay it, as "the debt is an honest one, but I have paid it," *Tichenor v. Colfax*, 4 N. J. L. 153 ; *Smith v. Freel*, Addis. (Penn.) 291 ; *Gray v. Kernahan*, 2 Const. Ct. (S. C.) 65, is not sufficient, although it is proved that the debt had not been paid, *Bailey v. Bailey*, 14 S. & R. (Penn.) 195, because no promise can be implied upon which to revive the debt. But if, upon being shown a note purporting to have been executed by him, he denies his signature thereto, but say, "Prove that I signed the note and I will pay it ;" if his signature is proved to be genuine, the statute bar is removed, because there is an express promise to pay upon the performance of a condition, notwithstanding his

denial. But if a debtor denies the debt, but says, "Prove by A. that I had the timber and I will pay for it ;" if it is proved by A. that he had the timber, then the statute bar is removed ; but proof of that fact by other witnesses, but not by A., will not remove the bar, because there is nothing to support the promise. *Robbins v. Otis*, 1 Pick. (Mass.) 368. So where, upon being shown a note, he admitted its genuineness, but said he "had not been duly notified and was clear by law," it was held not sufficient to remove the statute bar, although in fact he had been duly notified, because there is nothing upon which a new promise can be predicated. *Miller v. Lancaster*, 4 Me. 159. So, where a defendant says, "If I owe you anything I will pay it, but I owe you nothing," *Perley v. Little*, 8 id. 97 ; so where, upon being shown a note, the defendant said, "I don't think father intended I should pay the note ; I think I have paid it ; but I suppose I must pay it, if anything is due, and they insist upon it, as father is dead," *Russell v. Copp*, 5 N. H. 154 ; so where the defendant, after admitting the debt, said that "it was not in his power to pay it at that time, but he hoped to see the plaintiff and do something about it," *Hancock v. Bliss*, 7 Wend. (N. Y.) 267. But see *Olcott v. Scales*, 3 Vt. 173, where a contrary doctrine was held. An admission by the defendant after a debt is barred, that "it is just, so far as I know, but I left it to F., and

that the old debt forms a good consideration for a new promise, either express or implied, and that any clear and unqualified admission of the debt as an existing liability carries with it an implied promise to pay, unless such inference is rebutted either by the circumstances or the language used.¹

SEC. 65. Historical View of the Law relating to Acknowledgments.

— When the statute of James I. went into operation, the courts were inclined to construe it strictly, and an acknowledgment to take a case out of the operation of the statute was required to amount virtually to an express promise;² and in some of the cases it is suggested that not only must there be a new promise, but also that this promise must be founded on a new consideration.³ Later on, however, greater laxity

have kept no account myself," also adding that the defendants "were indebted to him," is not sufficient. *Fellet v. Linsley*, 6 J. J. Mar. (Ky.) 387. "I gave the note, but it is paid," *New Orleans, &c. Co. v. Harper*, 11 La. An. 212; *Dickinson v. McCamey*, 5 Ga. 486, is not sufficient. In *Pray v. Garcellon*, 17 Me. 145, a mere general admission, as "I owe him something," without stating how much or what for, was held insufficient. See also *Shitler v. Bremer*, 23 Penn. St. 413, to the same effect. To take a case out of the statute of limitations, the acknowledgment of indebtedness proved must be shown to relate to the particular demand in question. *Buckingham v. Smith*, 23 Conn. 453. And a naked admission of indebtedness, without indicating the amount or nature of the debt, or a promise to pay something, without any reference to the sum to be paid, or what it is to be paid for, is no answer to the plea of the statute of limitations. *Shitler v. Bremer*, 23 Penn. St. 413. But the question as to whether such an admission in a given case is sufficient must depend largely upon the circumstances, *Lord v. Harvey*, 3 Conn. 370; and the circumstances attending what was said must be taken into account, as they form a part of the *res gestæ*, *Whitney v. Bigelow*, 4 Pick. (Mass.) 110.

An acknowledgment by the defendant to a stranger that he had received the money of the plaintiff's testator, but that nobody could prove it, with a general statement that he would "satisfy" the plaintiff, is not such an acknowledgment or promise to pay as will answer the plea of the statute of limitations. *Zacharias v. Zacharias*, 23 Penn. St. 452.

¹ *Harbold v. Kuntz*, 16 Penn. St. 210; *Yan v. Kerr*, 47 id. 333; *Grant v. Ashley*, 12 Ark. 762; *Calks v. Weeks*, 7 Hill (N. Y.), 45; *Allison v. James*, 9 Watts (Penn.), 380; *Ash v. Patton*, 3 S. & R. (Penn.) 300; *Wakeman v. Sherman*, 9 N. Y. 88; *Porter v. Hill*, 4 Me. 41; *Peterson v. Cobb*, 4 Fla. 481; *Deshon v. Eaton*, 4 Me. 413; *Hand v. Lee*, 4 T. B. Mon. (Ky.) 36; *Gaucher v. Gondrau*, 20 La. An. 156; *Ferguson v. Taylor*, Hayw. (N. C.) 20. In some of the cases it is said that under the statute of limitations a presumption arises that the defendant, from the lapse of time, has lost the evidence which would have availed him in his defence if he had been seasonably called upon for payment; but, when this presumption is rebutted by an acknowledgment of the defendant within six years, the contract is not within the intent of the statute. *Baxter v. Penniman*, 8 Mass. 133; *Fiske v. Needham*, 11 id. 452; *Grist v. Newman*, 2 Bailey (S. C.), 92; *M'Lean v. Thorp*, 3 Mo. 215; *Gailer v. Grinnell*, 2 Aik. (Vt.) 349; *Lyon v. Marclay*, 1 Watts (Penn.), 271; *Bullock v. Perry*, 2 S. & P. (Ala.) 319; *Beale v. Edmondson*, 3 Call (Va.), 514. But it will be seen that these cases were decided when the old theory prevailed, and before it was regarded as essential that the acknowledgment should be such as to raise a new promise to pay the debt.

² *Lacon v. Briggs*, 3 Atk. 105; *Williams v. Gun Fortescue*, 177; *Bass v. Smith*, 12 Vin. Abr. 229.

³ POLLEXFEN, C. J., in *Bland v. Haselrig*, 2 Vent. 151.

prevailed, and the courts, acting upon the mistaken principle that the statute was predicated upon the presumption of payment of the debt, and that an acknowledgment that rebutted this presumption was sufficient, for a time held that any admission of a debt, however indirect, and even though accompanied with a distinct expression of an intention not to pay, removed the statutory bar.¹ But LORD ELLENBOROUGH, in

¹ *Bryan v. Horseman*, 4 East, 599; *Frost v. Benough*, 1 Bing. 266; *Partington v. Butcher*, 6 Esp. 66; *Mount Stephen v. Brooke*, 3 B. & Ald. 41; *Clark v. Hougham*, 2 B. & C. 149; *Dowthwaite v. Tibbut*, 5 M. & S. 75; *Scales v. Jacob*, 3 Bing. 688. To illustrate the old rule and its inconsistency I give the gist of a few cases. Thus, in *Baillie v. Siebald*, 15 Ves. 185, a plea of the statute was overruled upon letters from the defendant to the plaintiff assigning reasons for declining to pay, and recommending the plaintiff to bring an action, which were considered as amounting to an acknowledgment of the debt sufficient to take the case out of the statute, upon the authorities, though against principle. The case of *Dowthwaite v. Tibbut*, 5 M. & S. 75, was an action of assumpsit, to which the statute of limitations was pleaded. The plaintiff served as mate on a voyage to and from Russia in 1800, and the demand was for wages for that service, which took place during the Russian embargo. The witness, who proved the making a demand of payment on the defendant, proved also that the defendant answered to such demand, "I will not pay; there are none paid, and I do not mean to pay unless obliged; you may go and try." This was held sufficient to take the case out of the statute of limitations.

In assumpsit against the defendant as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then because it was out of date, and that he could not pay it, and that if it was not, it was not in his power to pay it, was held sufficient to take the case out of the statute, upon a plea of *actio non accrevit infra sex annos*. *Leaper v. Tatton*, 16 East, 420. In the case of *Peters v. Brown*, 4 Esp. 46, the plaintiff, to prove an acknowledgment of the debt by the defendant within six years,

called a witness, to whom the defendant was also indebted, and who having called on him for money, the defendant said, "I suppose you want money; but I can't pay you; I must pay Mr. Peters (the plaintiff) first, and then I'll pay you." Held, a sufficient acknowledgment, to take the case out of the statute, notwithstanding it was not made to the party himself. If a defendant admits a debt which would otherwise be barred by the statute of limitations, but claims to be discharged by a written instrument, but which being referred to does not amount to a legal discharge, he shall be bound by the admission, and the case be thereby taken out of the statute of limitations. *Partington v. Butcher*, 6 Esp. 66. In assumpsit for work and labor the statute was pleaded. Held, that evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town he would have the business settled, was sufficient to defeat the operation of the statute. *Poe v. Conway's Admr.*, 2 H. & J. (Md.) 307. In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years is admissible evidence to take the case out of the statute of limitations. *Gregory v. Parker*, 1 Camp. 394.

The doctrine of these cases was followed in numerous American cases, as in *Cadmus v. Dumon*, 1 N. J. L. 176; *Sheppard v. Cook*, 2 Hayw. (N. C.) 241. This doctrine and its inconsistency is well illustrated in *Harris v. Oliver*, 1 H. & G. (Md.) 204, in which the court advanced the doctrine that an acknowledgment, accompanied by a naked refusal to pay, and an excuse for not paying, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, was sufficient.

an English case previously referred to,¹ sounded the first note of change in this lax doctrine in deciding that while he felt bound by previous authorities to follow the laxer rule, yet intimated quite strongly that if the question was *res integra*, it might not be free from doubt; and GIBBS, C. J., in a later case,² expressed similar views; and from this the courts began to change the rule, until finally the doctrine was brought up to the true theory, upon which it now stands, and which has been previously stated.

The statute does not extinguish the debt, but only bars the remedy ;³

¹ Bryan v. Horseman, *ante*.

² Hellings v. Shaw, 7 Taunt. 608.

³ It is settled "that the statute of limitations does not destroy the debt," it only takes away the remedy. Quantock v. England, 5 Burr. 2630; Gustin v. Brattle, Kirby (Conn.), 803. It does not annihilate the debt, but suspends the remedy. Lord v. Shaler, 3 Conn. 181. It affects the remedy and not the right. Jones v. Hooks, 2 Rand. (Va.) 308; Graves v. Graves, 2 Bibb (Ky.), 207; Com. v. McGowan, 4 id. 63; Barney v. Smith, 4 H. & J. (Md.) 495; Oliver v. Gray, 1 H. & G. (Md.) 204.

In Hulbert v. Clark, 128 N. Y., 295, it was held that the statute of limitations is merely a statutory bar to a recovery, and acts only upon the remedy; it does not after the prescribed period destroy, discharge, or pay a debt or produce a presumption of payment, but simply stands in the way of the creditor seeking to compel payment.

A lien on property, personal or real, given as security for a debt is not impaired by the fact that the remedy at law for the recovery of the debt is barred by the statute. There is no question but that the legislature may repeal the statute, and that a debt upon which the right of action was barred by the statute at the time of the repeal may thereafter be enforced by action without invading the constitutional rights of the debtor.

An action for the foreclosure of a mortgage given to secure the payment of certain promissory notes, was brought within twenty years of the date of the mortgage, but more than six years after the notes fell due. There was no covenant in the mortgage to pay the notes. Held, that the action was not barred by the statute of limitations; that the mortgage continued

to be a subsisting lien, and could be foreclosed after an action at law upon the notes was barred by the statute.

Jackson v. Sackett, 7 Wend. (N. Y.) 94, distinguished and limited. Borst v. Corey, 15 N. Y. 505, distinguished and questioned. Reported below, 57 Hun, 558.

EARLE, J., in Hulbert v. Clark, *ante*, said: "The sole question for our determination is whether the mortgage continued to be a subsisting lien and could be foreclosed after an action at law upon the notes was barred by the statute of limitations. This is an interesting question which has given rise to considerable discussion in the courts of this country and England. We do not, however, deem it difficult of solution.

The statute of limitations does not, after the prescribed period, destroy, discharge, or pay the debt, but simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the statute of limitations and then the payment of a debt upon which the right of action was barred at the time of the repeal, could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation. It was so held in Campbell v. Holt, 115 U. S. 620. It was held in Johnson v. Albany & Susquehanna R. R. Co., 54 N. Y. 416, that the statute of limitations acts only upon the remedy; that it does not impair the obligation of a contract or pay a debt or produce a presumption of payment, but that it is merely a statutory bar to a recovery; and so it was held in Quantock v. England, 5 Burr. 2628, and so it has ever since been held in the English courts.

it may therefore be revived by a subsequent promise or an unqualified acknowledgment on the part of the defendant, although it was formerly

These notes were, therefore, not paid, and so the referee found. The condition of the mortgage has, therefore, not been complied with. The notes being valid in their inception, the only answer to the foreclosure of the mortgage is payment. The mortgage was given to secure payment of the notes, and until they are paid the mortgage is a subsisting security and can be foreclosed. The mortgage being under seal can be foreclosed by action at any time within twenty years. It is only an action upon the notes that is barred after six years. It is a general rule recognized in this country and in England, that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred. The subject has several times been under consideration in the courts of this State. In *Jackson v. Sackett*, 7 Wend. 94, ejectment was brought on a mortgage executed as collateral security for the payment of a sum of money secured to be paid by a note. The note had been past due more than twenty years when the action was commenced. Upon the trial it was the contention of defendant's counsel that from the lapse of time the note must be presumed to have been paid, and on that ground the court nonsuited the plaintiff. The Supreme Court upon review held, that the evidence as to payment ought to have been submitted to the jury, and nothing else was decided. It was, in fact, held that payment of note was the only defence to the action, but the jury writing the opinion expressed what must be conceded to be erroneous views as to the presumption of payment furnished by the statute of limitations. He appeared to be of the opinion that after six years there was a statutory presumption of payment, not a presumption of law, but a presumption of fact from which, with other evidence, the jury might infer payment. In *Heyer v. Pruyn*, 7 Paige, 465, the Chancellor said that the intimation of an opinion by JUSTICE SUTHERLAND in *Jackson v. Sackett*, "That a mortgage to secure a simple contract debt was presumed to be

paid in six years, because the statute of limitations might at the expiration of that time be pleaded to a suit on the note, certainly cannot be law." The case of *Pratt v. Huggins*, 29 Barb. 277, is quite like this. This was an action to foreclose a mortgage given to secure the payment of \$250, for which the mortgagee at the same time took the mortgagor's promissory note. The note and mortgage were dated Feb. 5, 1835, and were payable Feb. 1, 1836. The action was commenced Sept. 6, 1855. Upon the trial the defendant claimed that the plaintiff could not maintain the action because an action upon the note was barred by the statute of limitations, and so the trial judge held and gave judgment for the defendant. The plaintiff appealed to the General Term, and there, after much discussion and consideration the judgment was reversed, the court holding that a debt secured by a sealed mortgage and an unsealed note may be enforced by a foreclosure of a mortgage after the expiration of six, but before the expiration of twenty years from the time when the debt became due; that the lapse of six years is not conclusive evidence that the mortgage has been paid, and that the provision of the statute of limitations making the lapse of six years a bar in such case, is in terms confined to an action upon the note, and does not operate to defeat a remedy on the mortgage. There, as here, there was no covenant to pay in the mortgage, and the mortgage was collateral to the note. In *Mayor, &c. v. Colgate*, 12 N. Y. 140, it was held that the lien of an assessment which was to be regarded in effect as a mortgage, could be enforced after the statute of limitations would have barred a common-law action against the person liable to pay the same for the recovery thereof. In *Morey v. Farmers' Loan & Trust Co.*, 14 N. Y. 302, an action by the vendee for the specific performance of a contract under seal to convey land, on payment of the purchase-money, it was held that the presumption arising from the lapse of twenty years after the money became due was not suf-

held that a promise renewed within six years, if not upon a new consideration, would not be binding.¹ But it is now well settled that a

sufficient evidence of payment to entitle the plaintiff to the relief demanded. To the same effect is *Lawrence v. Bull* in the same volume at page 477. In *Borst v. Corey*, 15 N. Y. 505, it was held that an action to enforce the equitable lien for the purchase-money of land, was barred by the lapse of six years after the debt accrued. The reasoning by which the result was reached in that case is not altogether satisfactory, and yet that decision is not in conflict with the views we now entertain. The Judge there writing the opinion said: "The equitable lien (for the purchase-money) is neither created nor evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures." He distinguished that case from one like this as follows: "It has, however, been held that when a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debt, was no bar to an action to enforce the mortgage," and he cited among other cases *Heyer v. Pruyn*. He said further: "There is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage, and one to enforce a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it became due and payable. In *Johnson v. Albany & Susquehanna R. R. Co.*, *supra*, the action was to compel defendant to issue its certificate for stock subscribed for after an action to compel the subscriber to pay for the stock had been defeated on the ground that the action was barred by the statute of limitations; and it was held, that the plaintiff, notwithstanding the statutory bar, could recover only upon proof of actual payment. In *Lewis v. Hawkins*, 23 Wall.

119, MR. JUSTICE SWAYNE, in writing the opinion, recognizes the rule above stated as follows: "That the remedy upon the bond, note, or simple contract for the purchase-money is barred in cases like this, in nowise affects the right to proceed in equity against the land." *Hardin v. Boyd*, 118 U. S. 756, was a bill in equity to set aside a conveyance of lands, or in the alternative for the payment of the purchase-money, and to make it a lien on the lands; and it was held that, although the debt for unpaid purchase-money was barred by limitation under the local law, the lien therefor on the land was not barred. In *Coldcleugh v. Johnson*, 34 Ark. 312, the Supreme Court said: "The debt itself would appear to be barred in 1872, and no action could be brought at law; but the bar of the debt does not necessarily preclude a mortgagee or vendee retaining the title from proceeding *in rem* in a court of equity to enforce his specific lien upon the land itself." The case of *Thayer v. Mann*, 19 Pick. 535, is precisely in point. There is the case of a mortgage of real estate to secure the payment of a promissory note; it was held that although the note was barred by the statute of limitations, yet, because it had not been paid the mortgagee had his remedy upon the mortgage. In *Hancock v. Franklin Ins. Co.*, 114 Mass. 155, there was a pledge of property to secure a note, and it was held that the pledgor might avail himself of the statute of limitations as a defence to a suit upon the note, but that the statute affected merely the remedy on the note and did not defeat the lien of the pledgee upon the property pledged. In *Hannan v. Hannan*, 123 Mass. 441, in an action to foreclose a mortgage given to secure a note, it was held that the question in such a case whether anything is due upon the note must be conducted in nearly the same way, and depended mainly upon the same evidence as if the note were in suit, and that in such an action the defendant may show the same matters in defence against

¹ 2 Vent. 152.

promise of payment, or an unqualified acknowledgment of the debt as still due and unpaid, will, if made within the six years before action is brought, although the debt was contracted long before, deprive the defendant of the benefit of the statute. And a promise to pay a debt barred by the statute is sufficient without any new consideration. The original debt is a sufficient consideration, and the new promise revives the old debt instead of creating a new one.¹

the mortgage, except only the statute of limitations, that he could against the note.

In *Shaw v. Silloway*, 145 Mass. 503, it was said: "If there is an actual pledge and the debt becomes barred, this does not give the debtor a right to reclaim the pledged property. The debt is not extinguished, the statute only takes away the remedy. In case of an ordinary mortgage of real or personal property, the security is not lost, though the debt be barred." In *Joy v. Adams*, 26 Me. 330, it was held that the mortgagor could not defeat the right of the mortgagee to foreclose his mortgage by showing merely the notes to which the mortgage security was collateral had become barred by the statute of limitations. In *Belknap v. Gleason*, 11 Conn. 160, it was held that the statutes of limitations being statutes of repose, suspend the remedy, but do not cancel the debts; that though such statutes are equally available as a defence at law and in equity, yet where there are two securities for the same debt, one of which is barred by the statutes, and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter; and that where the security for a debt is a lien on property, personal or real, that lien is not impaired because the debt is barred by such statutes. In the case of *Ballou v. Taylor*, 14 R. I. 277, it was held, that the remedy on a mortgage is not lost because a personal action on the mortgage note is barred by the statute of limitations. In *Spears v. Hartley*, 3 Espinasse, 81, LORD ELDON held, "That a wharfinger who had a lien on a log of mahogany could hold the log until his demand was satisfied, although the demand was barred by the statute of limitations; and *Higgins v. Scott*, 2 B. & Ad. 413, is to the same effect."

¹ *Shackleford v. Douglass*, 31 Miss. 95; *Harlan v. Bernie*, 22 Ark. 217; *Illsley v. Jewett*, 3 Met. (Mass.) 439; *Newlin v. Duncan*, 1 Harr. (Del.) 204; *Kimmell v. Schwartz*, 1 Ill. 216. Letters written by a debtor to his creditor, acknowledging an indebtedness but declaring his inability to pay it, are sufficient to repeal the statute. *Bloom v. Kern*, 30 La. An. part 2, 1263. So an acknowledgment of a debt by a testator, by a schedule prepared at the time of making his will, if made within the period prescribed by statute before action brought, is sufficient. *Rogers v. Southern*, 4 Bax. (Tenn.) 67. See also *Scovel v. Gill*, 30 La. An. part 2, 1207; *Finkbone's Appeal*, 86 Penn. St. 368. But see *Canton Female Academy v. Gilman*, 55 Miss. 148, where a letter in these words was held insufficient: "It would suit my convenience to execute my note for the balance due you for rent, payable Jan. 1, 1877." In *Oliver v. Gray*, 1 H. & G. (Md.) 204, the effect of an acknowledgment upon the debt is ably discussed by BUCHANAN, J. He said: "The only difference between the act of limitations in this State and the statute of James is, that here the limitation is but three years; and in this State the rule prevailing in England, that an acknowledgment of the debt by the defendant within the time prescribed for bringing the suit is sufficient to take the case out of the statute, has been adopted. In *Barney v. Smith*, 4 H. & J. (Md.) 485, the venerable man who then presided (JUDGE CHASE), said: 'The act of limitations does not operate to extinguish the debt, but to bar the remedy. The act of limitations proceeds upon the principle, that from length of time a presumption is created that the debt has been paid, and the debtor is deprived of his proof by the death of his witnesses or the loss of receipts. It is

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the design of the act of limitations to protect and shield debtors in such a situation; and consistent with this principle and this view the decisions have been made, that the acknowledgment or admission of the debt will take the case out of the act of limitations; because, if the money is still due and owing, the defendant has not suffered from the lapse of time, nor has any inconvenience resulted to him therefrom.' And again, in another part of his opinion, he says: 'The acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar by the act of limitations. It does not create a new assumpsit, but is a saving of the remedy on the original promise.' We, therefore, are not called upon now for the first time to give a construction to that act; that task has been performed by others, at whose hands we have received it, with their interpretation of it, from which, if we were disposed to do so, we should not feel ourselves at liberty to depart.

"Perhaps it would have been better, if, instead of endeavoring to rescue particular cases out of its operation, the letter of the statute had been strictly adhered to; if the original debt had always been considered as extinguished, and the moral obligation treated as a sufficient consideration for an express promise to pay, on which to found an action. But according to all the cases (for in this at least they agree), the debt is considered as not extinguished, and the defendant can only avail himself of the statute in England, and act of assembly here, by pleading it; which, if he omits to do, it is held to be a waiver of its benefit, and the plaintiff may recover on the general issue, though the debt should appear by the declaration to be of no longer standing than the limited period. This settled construction has produced all the difficulties and discrepancies complained of; but it is a construction which is not now to be shaken by us; nor, on the other hand, should its operation be extended further than it has already gone.

"Taking the act of limitations, then, as we find it, operating upon the remedy

only, and not as extinguishing the debt, and feeling the necessity for a more definite and certain understanding of the effect of the adopted construction than can easily be collected from particular cases, we will endeavor not to reconcile the various decisions that are to be found in the books on this subject, but to lay down some general rules for the practical application of the principles they establish, that the act does not extinguish the debt, but only bars the remedy, and that an acknowledgment by the defendant of the debt, or a promise to pay it within the time prescribed, is sufficient to revive the action.

"1st, then, the suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only has the effect to restore the remedy; which is not only according to the common practice, but is directly and strongly asserted in *Barney v. Smith*.

"2d. It need not be absolute and unconditional, but a conditional promise is sufficient; and in such case it is incumbent on the plaintiff to show at the trial either a performance of the condition, or a readiness to perform it, as if the words be, 'prove your debt, and I will pay you,' which is an express promise to pay, on condition that the debt is proved. *Heyling v. Hastings*, 1 *Ld. Raym.* 889; *Trueman v. Fenton*, 2 *Cowp.* 548; *Davies v. Smith*, 4 *Esp.* 36; *Loweth v. Fothergill*, 4 *Camp.* 185; *Bush v. Barnard*, 8 *Johns. (N. Y.)* 407. These cases furnish different examples of conditional promises to pay, each of which was held sufficient to take the case out of the statute.

"3d. An acknowledgment to take the case out of the act of limitations must be of a present subsisting debt, unaccompanied by any qualification or declarations, which, if true, would exempt the defendant from a moral obligation to pay; for the law will not raise an assumpsit, or imply a promise to pay what in equity and good conscience a man is not bound to pay. As if the defendant admits the debt, but at the same time resists the payment of it by alleging that he has a set-off against it, and that the plaintiff owes him

only to cases founded upon assumpsit, and has no application where the action does not rest upon a promise. An express promise to pay a

more money, which virtually amounts to a denial of his liability, and a refusal to pay any part of it on grounds furnishing a sufficient moral excuse for not paying it, the acknowledgment is not sufficient to remove the statute bar. And, indeed, taking the whole of the acknowledgment together (which must always be done), if it is in effect equivalent to a declaration that the debt is discharged, it is not sufficient to raise the necessary new promise. If it were otherwise, and the plaintiff was permitted to avail himself of the acknowledgment of the debt, and to reject the qualification, injustice would always be done where the set-off, claimed by the defendant, should be itself barred by the act, or he should be in want of testimony sufficient to support it. Or, if he admits the receipt of money, and that it has not been paid, but claims it as a gift; which, if true, would exempt him from any liability to pay. Or if, on being called upon, the party says he has paid the debt, and will furnish the receipt, but fails to do so, this will not be sufficient to charge him; but is the very case intended to be provided for by the act, the case of a man who is supposed to have lost his evidence of payment.

"4th. What kind of promise or acknowledgment is sufficient to take a case out of the act of limitations is for the court to decide; and the evidence offered to prove such promise or acknowledgment is proper to be submitted to the jury, as in other cases, under the direction of the court.

"It has been contended in this case that where the defendant alleges the debt to have been discharged, and refers to a particular mode of discharge, the plaintiff may entitle himself to recover by disproving the mode of discharge referred to. We are aware that the same has been said elsewhere. In *Hellings v. Shaw*, 7 Taunt. 608, CHIEF JUSTICE GIBBS said: 'Where the defendant has stated, not that the debt remained due, but that it was discharged by a particular means, to which he has with precision referred himself, and where he has designated the time and mode so strictly, that the court can say it is im-

possible it had been discharged in any other mode. There the court have said, if the plaintiff can disprove that mode he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely.' But afterwards, in *Beale v. Nind*, 4 B. & Ald. 571, JUSTICE BAYLEY, after reciting the words of CHIEF JUSTICE GIBBS, says: 'I certainly am not aware of the cases to which my LORD CHIEF JUSTICE GIBBS refers to support that position.' Thus strongly questioning the soundness of the proposition, to which (seeing the inroads that have already been made upon the statute, which we are not disposed to push any farther, and no such decision having been made by this court) we are not prepared to yield our assent; but think that every acknowledgment of a debt, which is offered to take a case out of the act of limitations, must be taken altogether, and that no evidence can be received to turn a denial of the existence of the debt into an acknowledgment of a subsisting liability, by proving that he was mistaken in supposing it to have been paid; which would be to take a case out of the act of limitations by other proof than the acknowledgment of the party, for in such a case he manifestly not only does not intend to acknowledge a present subsisting debt, but in fact denies it, and there is nothing to carry, or on which the law can raise an implied assumpsit. The declarations of the defendant are the plaintiff's own proof; and if he chooses to introduce them, he must be content to take them as they are, and cannot be permitted to disprove them by other evidence, in order to raise an implied promise, or to furnish evidence of a promise to pay a debt the existence of which is denied. With these views of the subject we do not think, from the evidence set out in the record, that the plaintiff is entitled to recover. Whatever might have been the effect of the expressions of regret by the defendant, if they stood alone, 'that the plaintiff had been excluded from the deed of trust, and had not been allowed to come in for his claim,' the declarations always accompanying them, 'that he did

bond barred by statute does not remove the statute bar ; but it is held that an action of assumpsit may be maintained upon such promise, and the bond may be given in evidence as the consideration of the promise.¹ In a New York case,² a promise to pay a bond barred by the statute, evidenced by a written acknowledgment thereon within twenty years, was held sufficient to rebut the presumption of payment and to uphold an action on the bond ; and in a Missouri case³ it was held that a part payment of a bond removed the statute bar. In a Kentucky case⁴ it was held that where the obligor of a bond, with a full knowledge of his legal rights, admits his liability, such admission removes the statute bar, and a payment of interest on a bond before the statute has run thereon has been held sufficient to suspend the statute.⁵ But the present theory relative to acknowledgments, part payments, &c., is not applicable to specialties ; and where such debts are within the statute neither an acknowledgment, new promise, or part payment can operate either to suspend the operation of the statute or remove the bar when it has once attached. Upon such obligations the action is not, and in the nature of things cannot be, grounded upon a promise, but must be either in debt or covenant, or actions in effect the same ; and if the obligation is in anywise changed or altered by parol or a writing not under seal, it is instantly reduced to a simple contract ; but a promise to pay, or an admission of liability thereon, does not produce this effect. The action still remains a specialty action, and it is difficult to understand how to a plea of the statute a new promise can be replied ; and in Alabama⁶ it is held that a new promise will not revive such a debt. The same rule applies to all specialty debts, or debts which cannot be recovered in assumpsit. Thus it has been held, and, as we believe, correctly, that the replication to a plea of the statute of a new promise is not good in an

not consider that he was indebted to the plaintiff, because he had it in his power to have saved himself with the securities received from William Taylor, and ought not, therefore, to have looked to him for the money,' sufficiently show that it never was his intention to acknowledge the claim of the plaintiff as a subsisting debt due by him, but, on the contrary, taken together, amounted to a denial of any existing liability on him to pay, and for reason, which, if true, furnished a real objection and sufficient excuse for not paying it. For if the plaintiff had in his hands securities with which he should and might have covered his claim, but from negligence or misapplication of the funds did not do so, he should not now look to the defendant for it, nor can he be permitted, by evidence of the insufficiency of those securities, to convert

the defendant's denial of his liability into an acknowledgment of a present subsisting debt."

From the foregoing opinion I have stricken out all the propositions from three to ten, because they do not state the law as it now exists, otherwise it is a good exposition of the law upon the subject.

¹ *Young v. Mackall*, 3 Md. Ch. Dec. 398.

² *Carll v. Hart*, 15 Barb. (N. Y.) 565.

³ *Vernon County v. Stewart*, 64 Mo. 408.

⁴ *Tillett v. Com.*, 9 B. Mon. (Ky.) 438.

⁵ *Banning on Limitations*, 30 ; *Craige v. Callaway*, 12 Miss. 94 ; *Armistead v. Brooks*, 18 Ark. 521 ; *Hartman v. Sharp*, 51 Mo. 29.

⁶ *Crawford v. Childress*, 1 Ala. 482.

action upon a judgment of a court of record, the court holding that such replications were only applicable in actions upon promises.¹ But in New York² such a replication to an action on a justice's judgment was sustained; but it was sustained for reasons peculiar to that State, and upon a line of reasoning that will hardly commend it as an authority. But where the statute, as is the case in some of the States, expressly provides that part payment, &c., shall remove the bar as to this class of claims to the extent so provided, effect must be given thereto; and, as will be seen hereafter, where this class of claims are left to the operation of the presumption of payment and satisfaction arising from the lapse of time, a payment, or acknowledgment even, overcomes this presumption, and gives it a new period of life. If the gist of an action is the injury committed by the defendant, and the right of action is once barred by the statute, it is impossible to revive it by an acknowledgment that the defendant committed the injury, or of an indebtedness resulting therefrom;³ and in the case of torts no acknowledgment can, upon any principle, suffice to avoid the statute.⁴

¹ *Taylor v. Spicey*, 11 Ired (N. C.) L. 427; *Niblack v. Goodman*, 67 Ind. 174.

² *Carshore v. Huyck*, 6 Barb. (N. Y.) 588.

³ *Brand v. Longstreet*, 4 N. J. L. 325; *Avant v. Sweet*, 1 Brev. (S. C.) 228. In *Galligher v. Hollingsworth*, 3 H. & McH. (Md.) 122, a promise after the statute had run was held not sufficient to take a case out of the statute against a carrier for a loss of goods, as it was founded upon a tort. *Ott v. Whitworth*, 8 Humph. (Tenn.) 494; *Oothout v. Thompson*, 20 Johns. (N. Y.) 278; *Hurst v. Parker*, 1 B. & Ald. 92.

⁴ Where the plaintiff has the right to waive the tort and proceed in assumpsit, the rule stated in the text does not apply, especially if the plaintiff makes his election before the statute has run. *Morton v. Chandler*, 8 Me. 9. In an action of assumpsit, the declaration stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of England, to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff until within six years. On the discovery being made, the defendant said that it was owing to the

omission of his clerk, and that he, the defendant, was responsible. The statute of limitations having been pleaded, it was held that upon this form of declaration the plaintiff was not entitled to recover; and held, also, that upon this record such an acknowledgment was not sufficient to take the case out of the statute. *Short v. McCarthy*, 3 B. & Ald. 626. In another case the declaration stated that the defendant, on consideration, &c., promised to invest the plaintiff's money on good security; but that he invested it on bad security. The defendant pleaded the general issue and statute of limitations; replication, that defendant promised as above within six years; proof, that within that time the defendant acknowledged the security to be bad, and promised that plaintiff should be paid. Held, that the plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied. DALLAS, C. J., said: "To revive a debt by promise, and take a case out of the statute, there must be an antecedent debt, and if a promise should be made, when there is no antecedent debt, it would be necessary to frame a special declaration on such a promise." *Whitehead v. Howard*, 2 B. & B. 372. An assumpsit after three years is not sufficient to take a case out of the statute of limitations against a carrier, it being founded on a tort. *Galligher v.*

Thus, in the case last cited in the preceding note, a promise to make compensation for a trespass committed in illegally taking away coals in a coal-mine, was held not sufficient to revive the cause of action.¹ This doctrine, together with the present received doctrine as to the theory of acknowledgments, namely, that an acknowledgment, to be effectual, must amount to a fresh promise to pay, is well shown in the judgment of TENTERDEN, C. J., in an English case,² in which he said: "It is only in actions of assumpsit that an acknowledgment can be held an answer; and when, in the case of *Hurst v. Parker*, it was decided to be inapplicable to actions of trespass, LORD ELLENBOROUGH gave what appears to be the true reason, that in assumpsit 'an acknowledgment of the debt is evidence of a fresh promise,' and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states.³ If acknowledgment had the

Hollingsworth, 3 H. & McH. (Md.) 122. To an action on the case for a deceit in the sale of a negress, the defendant pleaded not guilty within six years, on which issue was joined. SPENCER, C. J., said: "The question then is, whether, if we consider the defendant as admitting the fraud, within six years, and declaring he was willing to do what was right, such admission and declaration can take the case out of the operation of the statute. The plea was that the defendant was not guilty within six years; the replication is, that he was guilty within six years next before the commencement of the suit. Now, it is inconceivable how an admission of the fraud within six years can render the party guilty of committing it anew. It was consummated when the sale took place, and any subsequent confession relates back to that period. The confession of the fact does not prove a new fraud, but the first and original one. The plaintiff, in his replication, has undertaken to prove that the defendant was guilty within the six years. Proving that he had acknowledged the fact within six years is no proof that the act was done within six years, and it does not support the issue. A case of this kind does not stand upon the same principle as the acknowledgment of a debt within six years. There, the acknowledgment is evidence of a new promise; here, it is not evidence of a new trespass, and therefore there is no analogy between the two cases. This view of the case satisfies me that without inverting all the rules of logic

(and special pleading has been aptly compared to logic), it is impossible to say that a confession of a tort is a re-perpetration of it; and, unless it is, the fact asserted in the replication, that the tort was committed within six years is not made out by a confession that the tort was committed more than six years before. *Oothout v. Thompson*, 20 Johns. (N. Y.) 278. In the case of *Hurst v. Parker*, 1 B. & Ald. 92, which was an action of trespass of breaking and entering coal-mines and taking away coals, the defendant pleaded *actio non accrevit infra sex annos*; to which the plaintiff replied in the affirmative. At the trial no evidence was given to show that the trespass was actually committed within six years. Held, that evidence of a promise to make compensation, made by the defendant within six years before the commencement of the action, and when he was threatened with an action for taking away coals, was not sufficient support to this issue; because the plaintiff was bound to prove the affirmative, that he had a good cause of action within six years before the commencement of the suit, and, as the action was predicated in tort, it could not be sustained by mere proof of a promise to compensate for it. But if the action had been predicated upon the promise, the rule would have been otherwise."

¹ *Hurst v. Parker*, 1 B. & Ald. 92.

² *Tanner v. Smart*, 6 B. & C. 603, 605.

³ In *Little v. Blunt*, 9 Pick. (Mass.) 488, what may be regarded as the correct

effect which the cases in the plaintiff's favor attribute to it, one would have expected that the replication to a plea of the statute could have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute, whereas the customary replication, ever since the statute, to let in evidence of acknowledgment, is that the cause of action accrued or the defendant made the promise within six years. And the only principle upon which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and, as such, creates a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, wherever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; where it does not so support them (though it may show clearly that the debt never has been paid, but is still a subsisting debt), the plaintiff fails."

SEC. 67. Crucial Test. Rule in A'Court v. Cross. — A crucial test at length arose in the case of *A'Court v. Cross*.¹ In that case the defendant had made an admission in the following terms: "I know that I owe the money, but the bill I gave is on a three-penny stamp, and I will never pay it." The decision in the case, which was in favor of the defendant, practically overruled a large course of intermediate decisions, and returned to something nearly approaching the strictness of the primitive construction of the act. *BEST*, C. J., in giving judgment, remarked: "I am sorry to admit that the courts of justice have been deservedly censured for their vacillating decisions on the 21 James I. c. 16. When by distinctions and refinement which, Lord Mansfield says, the common sense of mankind cannot keep pace with any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute." However, it is not wholly correct to say that an acknowledgment revives the previous debt. It rather, as has been seen, creates a new debt by virtue of an implied promise; yet it does none the less to a certain extent revive the previous debt, so far as is sufficient to make it a good consideration for the new promise.

The present doctrine on the subject was explained with great clearness by *WIGRAM*, V. C., in a leading English case,² as follows: "The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense and for that purpose the old debt may be said to be revived. It is revived as a con-

rule, and also identical with that stated in the text, was held. In that case the court say: "A new promise is a new cause of action, but the plaintiff may declare on the original promise, and if the statute is pleaded, he may reply the new promise. He need not declare specially on the new

promise." *Baxter v. Penniman*, 8 Mass. 133; *Sullivan v. Halker*, 15 id. 374; *Brown v. Anderson*, 13 id. 201; *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Kinne v. Schwartz*, 1 Ill. 216.

¹ 3 Bing. 329.

² *Phillips v. Phillips*, 3 Hare, 281.

sideration for a new promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

SEC. 68. Present Theory. — It may now be said that the theory of acknowledgment is settled as to simple contracts, on the principle that there is required either an express promise to pay the debt, or an absolute admission of indebtedness from which a promise to pay may naturally be inferred,¹ which new promise is sufficiently supported by the

¹ *Smith v. Thorne*, 18 Q. B. 134, 143; *Senseman v. Hershman*, 82 Penn. St. 83; *Miller v. Baschone*, 83 id. 356; *Wachter v. Albee*, 80 Ill. 47; *Faison v. Bowden*, 76 N. C. 425; *Carpenter v. State*, 41 Wis. 38; *Bell v. Crawford*, 8 Gratt. (Va.) 110; *Ross v. Ross*, 20 Ala. 105; *Bryan v. Ware*, 20 id. 687; *Ten Eyck v. Wing*, 1 Mich. 74; *Johnson v. Evans*, 8 Gill (Md.), 155; *Grant v. Ashley*, 7 Ark. 762; *Bailey v. Crane*, 21 Pick. (Mass.) 323; *Mumford v. Freeman*, 8 Met. (Mass.) 432. Except where the statute otherwise provides, an express promise is not necessary, *Black v. Reynolds*, 3 Harr. (Del.) 528; *Lee v. Polk*, 4 McCord (S. C.), 215; but the acknowledgment must be so explicit as to be equivalent to a promise, *Fellows v. Guimarin*, *Dudley* (Ga.), 100; *Brewster v. Hardeman*, id. 138; *Bradie v. Johnson*, 1 Sneed (Tenn.), 464. In *Bell v. Morrison*, 1 Pet. (U. S.) 351, *STORY, J.*, in a very able opinion, gave expression to what may be regarded as the modern rule, to the effect that an acknowledgment, in order to repeal the statute, must show positively that the debt is due, either wholly or in part, and must be unqualified. And if the bar is sought to be renewed by a new promise, that promise, as a new cause of action, must be proved in a clear and explicit manner, and be unequivocal and determinate. If there is no express promise, and a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. *Strickland v. Walker*,

37 Ala. 385; *Ash v. Patton*, 3 S. & R. (Penn.) 300; *Yaw v. Kerr*, 47 Penn. St. 333; *Evans v. Carey*, 29 Ala. 99; *Gaucher v. Gondrau*, 20 La. An. 156; *Conover v. Conover*, 1 N. J. Eq. 403; *Waples v. Layton*, 3 Harr. (Del.) 508; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Belles v. Belles*, 12 N. J. L. 339; *French v. Frazier*, 7 J. J. Mar. (Ky.) 425; *Oliver v. Gray*, 4 H. & G. (Md.) 204; *Phelps v. Sleeper*, 17 N. H. 332; *Hunter v. Kittredge*, 41 Vt. 359; *Steele v. Towne*, 28 id. 771. "If," said *SHAW, C. J.*, in *Sigourney v. Drury*, 14 Pick. (Mass.) 390, "more than six years have elapsed since the making of the original promise, or since the cause of action thereon accrued, it must appear that the defendant has made a new promise to pay within six years. Such promise may be express or implied, and a jury will be authorized and bound to infer such promise, from a clear, unconditional, and unqualified admission of the existence of the debt, at the time of such admission, if unaccompanied with any refusal to pay, or declaration indicative of any intention to insist on the statute of limitations as a bar." This language necessarily implies that the most unqualified admission of the existence of a debt will be insufficient to sustain recovery, if accompanied by expressions showing an intention not to pay it, or to rely on the statute for protection. The same rule prevails in the Supreme Court of the United States, where it has been repeatedly determined that evidence of the confessions of the defendant that the debt still subsists, will not render him liable, when more than six years have

consideration of the past debt;¹ and a clear admission of a debt being evidence, if un rebutted, of a new promise to pay sufficient to avoid the

elapsed since the cause of action accrued, unless they are unqualified by any expressions inconsistent with an intent of payment. This doctrine was held by MARSHALL, C. J., in *Wetzell v. Bussard*, 11 Wheat. (U. S.) 315, and still more strongly laid down in the subsequent case of *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 92. It was there said, that to take a case out of the statute, "where there is no express promise, there must be an unqualified and direct admission of a subsisting debt which

the party is willing to pay," and that if there are "accompanying circumstances which repel the intention to pay," the plaintiff cannot recover.

A new promise is held necessary, and on the maxim, *expressum facit cessare tacitum*, the fullest acknowledgment of a debt is not permitted to raise a legal promise of payment, when accompanied with expressions inconsistent with an intention to revive the obligation which the statute has extinguished. *Fries v. Boisselet*, 9

¹ *Phillips v. Phillips*, 3 Hare, 281. An acknowledgment must go to the fact that the debt is still due, *Clementson v. Williams*, 8 Cranch (U. S.), 72; and in addition to that, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed, *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86. If there is no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there are accompanying circumstances which repel the presumption of a promise or an intention to pay, if the expression is equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inference, which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise to revive the original cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309; *Bell v. Morrison*, 1 Pet. (U. S.) 351; and an acknowledgment of the original cause of action, accompanied by a refusal to pay, unless compelled by law, will not take the case out of the statute of limitations. *Jenkins v. Boyle*, 2 Cranch (U. S. C. C.), 120. Any offer on the part of the debtor operates to remove the bar of the statute of limitations, which, fairly interpreted, amounts to a promise to pay, or to

an acknowledgment of the debt or of some debt; as if the debtor says: "I will pay, if the demand is proved." If anything is added which negatives a promise of payment, or an acknowledgment of a debt, it must be considered as qualifying every expression; as if A. says he owes the debt, "but will not pay it, and will avail himself of the statute of limitations." And if the promise is conditional, the remedy is not revived unless the condition is performed. *Read v. Wilkinson*, 2 Wash. (U. S. C. C.) 514. An action may be revived, after the statute has barred it, either by a clear and unconditional acknowledgment of the debt, from which the law can imply a promise to pay, or by a conditional acknowledgment. In the latter case, the liability attaches, under the conditions. *Kampshall v. Goodman*, 6 McLean (U. S.), 189. Where an acknowledgment of a debt is connected with any condition which shows there was no intention to pay the debt, it does not take the case out of the statute. If the acknowledgment of the debt is coupled with a proposition to pay it partly in money and partly in property, the payment can only be enforced on the terms proposed. The original debt is not revived, and it is considered only as affording a good consideration for the new promise. *Lonsdale v. Brown*, 4 Wash. (U. S. C. C.) 148. For an offer of compromise, not sufficient to take a case out of the statute of limitations, see *Neil v. Abbott*, 2 Cranch (U. S. C. C.), 193; *Ash v. Hayman*, id. 452; *Bank of Columbia v. Sweeny*, 3 id. 293.

statute, it follows that three questions will usually arise as to any alleged acknowledgment: First, is there an admission of the debt in

S. & R. (Penn.) 128; *Church v. Feterow*, 2 Penn. 305; *Hogan v. Bear*, 5 Watts (Penn.), 111; *Berghaus v. Calhoun*, 6 id. 220; *Allison v. James*, 9 id. 381; *Hay v. Kramer*, 2 W. & S. (Penn.) 138; *Gilkyson v. Larue*, 6 id. 217. The same rule prevails in most of the other States, and there can be no recovery in cases barred by the statute, without such an acknowledgment of the obligation of the defendant, as to constitute a new cause of action when the suit is brought in debt, or raise a new promise by implication when it is in assumpsit. *Bromwell v. Buckman*, 7 Blackf. (Ind.) 537; *Robbins v. Farley*, 2 Strobb. (S. C.) 348; *Dickinson v. Conway*, 5 Ga. 486; *M'Lellan v. Albee*, 17 Me. 184; *Pray v. Garcelon*, id. 145; *Porter v. Hill*, 4 id. 41; *Perley v. Little*, 3 id. 97; *Ventris v. Shaw*, 14 N. H. 422; *Shaw v. Newell*, 1 R. I. 488; *Fry v. Kerk*, 4 G. & J. (Md.) 509; *Ten Eyck v. Wing*, 1 Mann. (Mich.) 40; *Taylor v. Stidman*, 11 Ired. (N. C.) 440; *Sherrod v. Bennett*, 8 id. 309; *Cross v. Conner*, 14 Vt. 398; *Phelps v. Stewart*, 12 id. 263; *White v. Dow*, 23 id. 300; *Brainerd v. Buck*, 25 id. 573; *Ayres v. Richards*, 12 Ill. 146; *Exeter Bank v. Sullivan*, 6 N. H. 132; *Tillet v. Linsey*, 6 J. J. Mar. (Ky.) 337; *Head v. Manners*, 5 id. 255; *Harrison v. Handley*, 1 Bibb (Ky.), 443; *Gray v. Lawridge*, 2 id. 285.

The admission must not only be unqualified in itself, but there must be nothing in the attendant acts or declarations of the defendant to qualify it, or rebut the inference of willingness to pay, to which an unqualified admission naturally and primarily gives rise. Thus, in *Rackham v. Marriott*, 2 H. & N. 195, in answer to an application for payment of a debt, the debtor wrote as follows: "I do not wish to avail myself of the statute of limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satis-

factory arrangement. I am much obliged to you for your forbearance." It was held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the letter contained no sufficient acknowledgment or promise to take the case out of the statute of limitations. COCKBURN, C. J., in rendering the opinion of the court, said: "We are all agreed that the judgment of the Court of Exchequer ought to be affirmed. There is here an acknowledgment of a debt, but not an acknowledgment coupled with a promise to pay, either on demand, or at a future period which has elapsed, or on a condition which has been fulfilled. An acknowledgment without a promise is not sufficient to take a case out of the statute of limitations. Looking to the current of authorities, and more especially to the last case on the subject, *Smith v. Thorne*, 18 Q. B. 134, and being of opinion that the principle is applicable to the present case, we think that the acknowledgment must amount to a promise to pay either on request, or at a future period, or on a condition. Here there is a mere expression of a hope to make some satisfactory arrangement, not an acknowledgment coupled with a promise to pay. And to remove the bar of the statute, the promise must either be immediate and unconditional, or proof must be given that the conditions, if any, have been accepted and fulfilled, *The Kensington Bank v. Patton*, 16 Penn. St. 479; but the admission or assumption of an immediate legal liability will be sufficient without a promise to pay immediately, for otherwise no debt could be revived, unless the debtor had the cash about him, or where he could lay his hands on it at once, *Shitler v. Bremer*, 23 Penn. St. 413; *Zacharias v. Zacharias*, id. 452; *Steele v. Towne*, 28 Vt. 777. To take the case out of the statute, the acknowledgment must be clear and unequivocal; for since it acts, not by reviving the old promise, but by creating a new one, it must be an acknowledgment from which this new promise may be implied. *Hurst v. Parker*, 1 B. & Ald. 92; *Phillips v. Phillips*, per WIGRAM, V. C., 3 Hare, 281; *Buckmaster v. Russell*, per

question? second, is such admission narrowed by any qualification which rebuts the presumption of a promise, or subject to any condition on the fulfilment of which the implied promise is dependent? and,

WILLIAMS, J., 10 C. B. N. s. 749. If, therefore, there is anything in the language inconsistent with that intention, the statute is not satisfied. The acknowledgment must be in direct terms. *Cockrill v. Sparke*, 1 H. & C. 699. There are two classes of cases upon this subject: the one where there has been an absolute and unconditional acknowledgment of the debt, though with an appeal to the forbearance of the creditor; the other where the acknowledgment is limited by some qualification or condition. In both cases the debt is taken out of the statute; for if the acknowledgment is distinct, a promise to pay is implied; but if the acknowledgment is simple and absolute, the promise implied is a promise to pay on request; if conditional, a promise to pay according to the condition. *Tanner v. Smart*, 6 B. & C. 603; *Smith v. Thorne*, per PARKE, B., 18 Q. B. 143. The former class is represented by *Cornforth v. Smithard*, 5 H. & N. 13, where the words, "I am ashamed the account has stood so long," were held to be a sufficient acknowledgment, and not to be limited by words following them which asked for time; and the fact relied on in that case, that the letter was written before the debt was barred, when the debtor was not in a position to impose terms, cannot be reasonably supposed to have meant to restrict his promise. The remarks of BRAMWELL, B., in *Sidwell v. Mason*, 2 H. & N. 310, fairly illustrate the second class. He says: "It seems to me a mistake has been made in several cases with respect to the expression of hope, in holding that, because along with an unconditional acknowledgment of a debt a man expresses a hope to be able to do that which he was legally obliged to do, such an acknowledgment is not sufficient." This doctrine is also applied in and aptly illustrated by a Pennsylvania case, *Miller v. Baschore*, 83 Penn. St. 356, in which the plaintiff relied on a letter as follows, to take the debt out of the statute:—

PHILADELPHIA, March 23, 1869.

MRS. CATHARINE BASCHORE:

I have received a letter from you some time ago, asking of me to let you know what I intended doing with balance of a note I owe you. It is hardly necessary to tell you that I had a great deal to pay when I failed, for you know that I have paid off many of my old debts, and calculate to pay all I owe. Just now I cannot pay you anything, for one reason, I compromised with John Geo. Seltzer to pay him in instalments of which I have paid one, and another is coming due on the first of April, which I must somehow arrange, and then I have to pay him one more note which comes due April 1, 1870, and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me that I will not pay you, for I expect to pay all I owe. If you think I am not telling you the truth, you can ask J. G. Seltzer himself.

I remain your friend,

JOHN W. MILLER.

The jury rendered a verdict for plaintiff, and it was set aside by the Supreme Court, on the ground that the letter was not a sufficient acknowledgment. GORDON, J., said: "The evidence was not sufficient to relieve the claim of the plaintiff below from the effect of the statute of limitations. In order to effect such a result there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay. In the case under consideration the acknowledgment and undertaking of the defendant lack these essential characteristics." A third class of cases, in which it has been held that there has been no sufficient acknowledgment, is illustrated by *Rackham v. Marriott*, 2 H. & N. 196, and is characterized by the fact that in no part of the document is there any distinct acknowledgment of the existence of the debt.

third, if there is a condition, has it been satisfied? On the first question there is considerable liberality in construing a reference to a debt as an admission. Thus, where the admission was in the following terms, "I am ashamed the account has stood so long," it was held to be a good acknowledgment.¹ In another case,² the debtor wrote as follows: "I hope to be in Hampshire very soon, when I trust everything will be arranged with W. [the creditor] agreeable to her wishes;" and this was held a sufficient acknowledgment. And in a later English case³ the two following letters written by the defendant were held sufficient to prevent the operation of the statute, although in fact no account was sent in, in compliance with the request in the letters. The letters were as follows:—

JANUARY 13, 1872.

MR. QUINCEY,

SIR,—I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders until this be done.

I am, Sir,

Your humble servant,

J. SHARPE.

FEBRUARY 19, 1872.

MR. QUINCEY,

SIR,—You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week.

To oblige, Sir,

Yours, &c.,

JNO. SHARPE.

Thus it will be seen that an admission of the debt will be sufficient, although the exact amount payable is disputed, or remains to be proved.⁴ But in all cases the acknowledgment must be in terms so

¹ Cornforth v. Smithard, 5 H. & N. 13.

² Edmonds v. Goater, 15 Beav. 415.

³ Quincey v. Sharpe, W. N. 1876, 72.

⁴ Colledge v. Horn, 3 Bing. 119; Gardner v. M'Mahon, 3 Q. B. 561; Sidwell v. Mason, 2 H. & N. 306. Where defendant said of a note, "that he had signed the same with his son, and that in the end he thought he should have it to pay," it was held that this was an unqualified acknowledgment that the note was signed by him, that it was still unpaid, that his liability was then subsisting, and that this acknowledgment took the case out of the statute of limitations; and the case is not varied by the expression, "that enough had been paid to pay the debt, if it had been paid

when it should have been." Phelps v. Williamson, 26 Vt. 230. So, where payment was demanded of a defendant, who said: "I supposed it was paid by White, by an arrangement; tell your father to put White up to pay it; if he does not, I shall have to pay it." Held, that this was an admission of a continuing liability, and, with proof that White had not paid, took the case out of the statute of limitations. Hayden v. Johnson, 26 Vt. 768. But where a request being made to a defendant to pay a note as he had agreed to do, he answered, that "folks do not always do as they agree," it was held that this was not evidence of a new promise sufficient to take the note out of the operation of the

distinct and unqualified that a promise to pay upon request or at some fixed time may reasonably be inferred from it.¹ It must be clear and explicit, and not incumbered with any conditions.²

statute. *Douglass v. Elkins*, 28 N. H. 26. But where the maker of a note says to the payee, that if he will wait awhile he will pay the note, and that he will pay when he "makes a raise," not being at the time in a condition to pay, the note will be taken out of the statute. *Horner v. Starkey*, 27 Ill. 13. A promise by the defendant, that he will settle with the plaintiff as soon as he receives his pay for certain work, is a conditional promise; and does not waive the statute unless it is proved that he has received his pay. *Mullett v. Shrumph*, 27 Ill. 107. In answer to an application for a debt barred by the statute of limitations, the defendant wrote: "I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of £40 9s. 6d. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851; but as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly." Held, that this was not such an absolute unqualified acknowledgment and unconditional promise to pay as to take the case out of

the statute. *Buckmaster v. Russell*, 10 C. B. N. s. 745. An action of debt upon a promissory note is not taken out of the statute of limitations by an acknowledgment made by the defendant, within six years, that the debt was honest. *Rice v. Wilder*, 4 N. H. 336. The words, "the debt is an honest one, but I have paid it," are not sufficient to take a debt out of the statute. *Tichenor v. Colfax*, 4 N. J. L. 153.

¹ *Oakson v. Beach*, 36 Iowa, 171; *Smith v. Fly*, 24 Tex. 345; *Brown v. State Bank*, 10 Ark. 134; *Watkins v. Stevens*, 4 Barb. (N. Y.) 168; *Bloodgood v. Bruen*, 8 N. Y. 362. In some of the cases it is said that the acknowledgment must be an unequivocal and positive recognition of a subsisting debt, which the party is liable and willing to pay. *Purdy v. Austen*, 38 Wend. (N. Y.) 187; *Allen v. Webster*, 15 id. 284; *Loomis v. Decker*, 1 Daly (N. Y. C. P.), 186. The early cases in New York, however, were quite conflicting, and inconsistent with the rule as stated. Thus, in *Danforth v. Culver*, 11 Johns. (N. Y.) 146, where the defendant admitted the execution of the note, but said it was outlawed, and he should plead the statute, the acknowledgment was held insufficient. But in a later case, *Murray v. Carter*, 20

² A new promise is requisite to remove the bar of the statute of limitations, and although it will be implied by the law, from an unqualified acknowledgment of the existence of the debt, yet such will not be the case when the acknowledgment is qualified, nor when it is accompanied with an express declaration of an inability or unwillingness to pay. *Fries v. Boisslet*, 9 S. & R. (Penn.) 128; *Church v. Feterow*, 2 Penn. 301; *Hay v. Kramer*, 2 W. & S. (Penn.) 138; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Bradley v. Field*, 3 Wend. (N. Y.) 272; *Hancock v. Bliss*, 7 id. 267; *Allen v. Webster*, 15 id. 289; *Gaylord v. Loan*, id. 314; *Bailey v. Crane*, 21 id. 324; *Danforth v. Culver*, 11 Johns. (N. Y.)

146. There must be nothing in the language used by the debtor that repels the inference of a promise to pay; if there is, the acknowledgment is insufficient. Thus, if a debtor pays or promises to pay a part of his debt, under an agreement with his creditor that it shall be in full satisfaction of the whole claim, such payment or promise to pay will not be sufficient to prevent the operation of the statute of limitations upon the balance of the debt. *Bowker v. Harris*, 30 Vt. 424. So where a debtor, while denying the justness of an account, said that, "if his creditor would swear to it, he would pay it," and "that if it was just, he would pay it," it was held that these were not such acknowledgments as would take the debt out of the statute of limita-

It is not necessary that the promise should be actual or express, pro-

Johns. (N. Y.) 576, where the claim was admitted to be subsisting and unsatisfied, but the defendants explicitly declared that they did not regard themselves as liable thereon because of the lapse of time, and declared their intention to plead the statute in case their offer of settlement was refused, it was held sufficient to remove the bar. In some of the cases it is said that the acknowledgment must be so full and precise as to enable the court to apply the terms of it exactly as the party intended they should be applied, *Suter v. Sheeler*, 22 Penn. St. 308; *Shitler v. Bremer*, 23 id. 413; *Miller v. Baschore*, 83 id. 356; *Harbold v. Kuntz*, 16 id. 210; *Webster v. Newbold*, 41 id. 482; *Wolfensberger v. Young*, 47 id. 516; *Strickland v. Walker*, 87 Ala. 385; *Smith v. Fly*, 24 Tex. 345; *Evans v. Carey*, 29 Ala. 99; *Yaw v. Kerr*, 47 Penn. St. 333; *Head v. Manners*, 5 J. J. Mar. (Ky.) 255; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Newcomb v. Niel*, Harp. (S. C.) 355; *Harrison v. Handley*, 1 Bibb (Ky.), 443; and of such a character that a promise to pay can be fairly and naturally

implied, *Moshier v. Hubbard*, 13 Johns. (N. Y.) 510; *Chambers v. Garland*, 3 Green (Iowa), 322; *Wakeman v. Sherman*, 9 N. Y. 88; *Young v. Monpoey*, 2 Bailey (S. C.), 278; *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86; *Pritchard v. Hamell*, 1 Wis. 131; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Berghaus v. Calhoun*, 6 Watts (Penn.), 219; *Ash v. Patton*, 3 S. & R. (Penn.) 306; *Grant v. Ashley*, 12 Ark. 762. An express promise, except where the statute expressly so provides, is not necessary. It is enough if the admission of liability is such that a promise to pay can be implied. *Burton v. Wharton*, 4 Harr. (Del.) 296; *Elliott v. Leake*, 5 Mo. 208; *Lee v. Polk*, 4 McCord (S. C.), 215; *Keener v. Crull*, 19 Ill. 189; *Bullock v. Smith*, 15 Ga. 395; *Harwell v. McCulloch*, 2 Overt. (Tenn.) 275. The acknowledgment must be consistent with a promise to pay. *Guier v. Pierce*, 2 Browne (Penn.), 35; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *McClelland v. West*, 59 Penn. St. 487. If there is an acknowledgment of a subsisting debt, and nothing to rebut the inference of an

tions. *Goodwin v. Buzzell*, 35 Vt. 9. So where B., having failed, carried on business in the name of A., though in fact the business was his own. He gave a note to G., signed as agent, after A. had forbidden him to give notes without leave. G., several years afterward, took the note to A. and asked him to pay it. A. replied that G. "ought to have his pay, that it was right he should have it, but that he (A.) had lost a great deal in the business, and was not worth anything, and he could not pay it." It was held that this was not such an acknowledgment as took the note out of the statute of limitations. *Galpin v. Barney*, 87 Vt. 627. The naked acknowledgment of an existing liability is not such a declaration of willingness to remain liable as to imply a promise to pay. Thus, where the defendant, on being requested by the plaintiff to renew notes on which the statute of limitations had run, replied: "I will come up soon and have a general settlement of accounts, and if all accounts are all right, other matters will be all right," there being no "other matters" between the parties

than the notes; and, on a repetition of the request a year afterwards, replied: "We have a long string of accounts to look over; if I find that all right and satisfactory, the notes will be all right." *Brayton v. Rockwell*, 41 Vt. 621; *Higdon v. Stewart*, 17 Md. 105; *Parsons v. Northern, &c. Iron Co.*, 38 Ill. 430; *Cambridge v. Hobart*, 10 Pick. (Mass.) 232; *Penn v. Crawford*, 16 La. An. 255; *Thornton v. Crisp*, 22 Miss. 52; *Kelly v. Sanborn*, 9 N. H. 46; *Butterfield v. Jacobs*, 15 id. 140; *Brackett v. Mountfort*, 12 Me. 72; *Fischer v. Hess*, 9 B. Mon. (Ky.) 614; *Conwell v. Buchanan*, 7 Blackf. (Ind.) 537; *Sloan v. Sloan*, 11 Ark. 29; *Mills v. Taber*, 5 Jones (N. C.) L. 412; *Ballinger v. Barnes*, 3 Dev. (N. C.) L. 460; *Gilmer v. McMurray*, 7 Jones (N. C.) L. 479; *Taylor v. Stedman*, 11 Ired. (N. C.) L. 411. A promise to remove the bar of the statute of limitations must be a promise to pay a debt. A promise to settle with the claimant is not sufficient. *Bell v. Crawford*, 8 Gratt. (Va.) 110.

A letter from the defendant to the plaintiff in which he denies that he was ever

vided the other necessary facts are shown. A clear, distinct, and un-

intention to pay it, it is sufficient. "The slightest acknowledgment," says LORD MANSFIELD, in *Trueman v. Fenton*, 2 Cowp. 550, "has been held sufficient, as saying, 'prove your debt, and I will pay you,' 'I am ready to account, but nothing is due you.' And much slighter acknowledgments than these will take the debt out of the statute." "I am sure I don't owe you; but if I do, I am willing to pay." *Steele v. Towne*, 28 Vt. 771; *Paddock v. Colby*, 18 id. 485. "I promise not to plead the statute of limitations." *Stearns v. Stearns*, 32 Vt. 678; *Lowry v. Dubois*, 2 Bailey (S. C.), 425; *Glenn v. M'Cullough*, Harp. (S. C.) 484; *Lindsay v. Jameson*, 4 McCord (S. C.), 93. "If the note has not been paid, I will settle it." *Sothoron v. Hardy*, 8 G. & J. (Md.) 133; *Richmond v. Fugna*, 11 Ired. (N. C.) L. 445. Where a defendant said, on production of a note against him, "It's as good as money," *Arnold v. Dexter*, 4 Mas. (U. S.) 122; or, "my notes never out-law," but that there were some other mat-

ters to be settled, and he would be down in a few days and settle it, *Phelps v. Sleeper*, 17 N. H. 332, — have all been held sufficient. In *Edmonds v. Goater*, 15 Beav. 415, the defendant wrote, in answer to an application for payment of a debt, "I hope to be in Hampshire very soon, when I trust everything will be arranged with W. (the creditor) agreeable to her wishes;" and that was held by SIR J. ROMILLY, M. R., a sufficient promise. So in *Collis v. Stack*, 1 H. & N. 605, the following answer to an application for payment was held sufficient: "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer, and all will be right. The works I have been appointed to, but they are not yet worked with the full compliment of labor; this term will decide the matter." *Tanner v. Smart*, 6 B. & C. 603, put a conditional promise, with proof of ability to pay, on the same footing as an absolute promise.

liable to the plaintiff's demand, but states that another person is responsible, by whom he takes it for granted payment has not been made, and of whom he offers to furnish the plaintiff with evidence to recover, will not avoid the act of limitations. *Brown v. Campbell*, 1 S. & R. (Penn.) 176. Where the defendant admits that he has received the money, which the plaintiff claims, but denies the validity of the claim, such acknowledgment is not evidence of a new promise so as to take a case out of the statute of limitations. *Sands v. Gelston*, 15 Johns. (N. Y.) 511. *Marshall v. Dolliber*, 5 Conn. 486; *Bell v. Rowland*, Hard. (Ky.) 301; *Ferguson v. Taylor*, 1 Hayw. (N. C.) 92.

Where the defendant says, that if the plaintiff has a claim either at law or equity, he will compromise the business, or submit it to arbitration, but, at the same time, denies that he has any claim either at law or equity; this is not sufficient to take the case out of the statute. *Sands v. Gelston*, 15 Johns. (N. Y.) 84. In this case SPENCER, J., said: "I am bound by authority to consider the acknowledg-

ment of the existence of a debt within six years before the suit was brought, as evidence of a promise to pay the debt. But I insist that if, at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, then it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute. In consonance with this distinction, I take it, the case of *Danforth v. Culver*, 11 Johns. (N. Y.) 146, and *Lawrence v. Hopkins*, 13 id. 288, were decided in this court." *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 290. An offer by a defendant to compromise a suit, which is rejected, cannot be made use of to take the case out of the statute of limitations. *Lawrence v. Hopkins*, 13 Johns. (N. Y.) 288; *Murray v. Coster*, 4 Cow. (N. Y.) 635. An acknowledgment to take a case out of the statute of limitations must be such a one as is consistent with a promise to pay. *Guier v. Pearce*, 2 Browne (Penn.), 35; *Read v. Wilkinson*, 2 id. 48; *Scull v. Wallace*, 15 S. & R. (Penn.) 231.

The statute of limitations is a good plea

equivocal acknowledgment of a debt is sufficient to take a case out of

in bar, in a court of equity as well as at law, unless there "be something special in the case, or some new equity to form an exception to this general rule;" and where to a suit at law the defendant had pleaded the statute, and the plaintiff filed a bill of discovery, with a view to enable him to show a promise within six years, it was held that the defendant was not bound to discover anything that would destroy the effect of his plea at law. *Lansing v. Starr*, 2 Johns. (N. Y.) Ch. 150, 151; *Kanes v. Bloodgood*, 7 id. 90. In the case of *Tichenor v. Colfax*, 3 N. J. L. 155, KIRKPATRICK, C. J., said: "The pleading of the statute of limitations never calls in question the justness of the debt originally; it only raises the presumption that the same has been satisfied or paid; and to this presumption the statute gives effect by taking away the party's remedy to recover. For the defendant, therefore, to say that the debt was just, but that he had paid it, was no admission of, or assumption to pay, an existing debt, but the contrary; and notwithstanding such acknowledgment he might well put himself upon the statute to protect him from further vexation."

An acknowledgment of the original justice of the claim is not sufficient; "it must go to the fact that it is still due." *Clementson v. Williams*, 8 Cranch (U. S.), 72, 74; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 314, 315; *Thompson v. Peter*, 12 id. 567; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Baxter, Admr., &c. v. Penniman*, 8 Mass. 133; *Lord v. Shaler*, 3 Conn. 133; *Marshall v. Dalliber*, 5 Conn. 480; *Tichenor v. Colfax*, 3 N. J. L. 153; *Jones v. Moore*, 5 Binn. (Penn.) 576; *Cowan v. Magauran*, 1 Wall. (U. S.) 66; *Harrison v. Handly*, 1 Bibb (Ky.), 443, 445; *Ormsby v. Letcher*, 3 id. 271; *Bell v. Rowland*, Hard. (Ky.) 301; *Roosevelt v. Marks*, 6 Johns. (N. Y.) 290. And the same rule holds as to acknowledgments to repel the presumption of payment arising from lapse of time in cases not within the statute. *Boyd v. Grant*, 18 S. & R. (Penn.) 124. A mere indorsement made on a note by the plaintiff himself, without the knowledge of the de-

fendant, or proof of payment of the sum indorsed, will not take the demand out of the statute of limitations. *Whitney v. Bigelow*, 4 Pick. (Mass.) 110.

Where the maker of a promissory note delivered goods to the holder to be sold, and the proceeds appropriated towards the payment of the note, and a sale of some of the goods was not effected until nearly six years after, it was held, that if the proceeds were indorsed upon the note within a reasonable time, it would be considered, in reference to the statute of limitations, as a payment made by the maker's order. But if the holder, without any assent on the part of the maker or any notice to him, makes the sale and indorsement after a reasonable time has elapsed, this will not take the note out of the statute. *Porter v. Blood*, 5 Pick. (Mass.) 54. In the case of *Fuller v. Hancock*, 1 Root (Conn.), 238, 241, the court said, that "an indorsement upon a bond doth not save it out of the statute of limitation." An agreement of a debtor that a settlement made by the creditor and a third person should be examined by either party, will not take a case out of the statute of limitations. *Ormsby v. Letcher*, 3 Bibb (Ky.), 270. A vote passed at a town meeting, appointing a committee to "settle the dispute" between the town and the plaintiff, was held not to take the plaintiff's demand out of the statute of limitations. *Fiske v. Needham*, 11 Mass. 452. A debt which is barred by the statute is not revived by a clause in a will ordering the testator's just debts to be paid. *Smith v. Porter*, 1 Binn. (Penn.) 209; *Roosevelt v. Marks*, 6 Johns. (N. Y.) Ch. 266. Creating a trust upon a personal estate by will, for the payment of debts, will not revive a debt barred by the statute of limitations. *Campbell v. Sullivan*, Hard. (Ky.) 17; *Ex parte Dewdney*, *Ex parte Seaman*, 15 Ves. 488; *Ex parte Roffey*, 19 id. 470. A debt barred by the statute is not revived by a direction in the debtor's will, that certain property be sold, "and with the proceeds thereof, after paying my debts, that they redeem," &c. *Walker v. Campbell*, 1 Hawks (N. C.), 304. A trust created by will for the payment of debts, by a general direction that all the testator's

the operation of the statute. It must be an admission consistent with a

debts shall be paid, extends only to such as he was bound in conscience to pay; therefore, an undertaking which is merely *nudum pactum* is not comprehended, and may be barred by the act of limitations. *Chandler v. Hill*, 2 H. & M. Va. 124. A provision in a will, that the money arising from the sale of the testator's personal property, after payment of his just debts, shall be applied to certain purposes, does not create a trust for the payment of the debts, nor take any debt out of the operation of the statute. *Brown v. Griffith*, 6 Munf. (Va.) 450. In the case of *Burke v. Jones*, 2 V. & B. 275, the Vice-Chancellor decided that a devise in trust for payment of debts does not revive a debt upon which the statute of limitations had taken effect by the expiration of the time before the testator's death. And in commenting upon the argument urged, viz. that a contrary rule existed in equity, he said: "No case has been cited within the period of half a century in which such a rule is stated as existing, except for the purpose of complaining of it. It was justly observed that those complaints are a recognition of the rule by very high authorities; and there is certainly considerable authority for concluding that such a rule has been understood as prevailing, that a devise of real estate for the payment of debts would let in debts barred by the statute of limitations. It must, however, be remembered, that the last time it appears in print, in the case of *Oughterloney v. Earl Powis*, Amb. 231, LORD HARDWICKE did not consider it so established that it should be acted upon without consideration, expressing surprise how such a rule could be established. It has received the decided disapprobation of LORD KENYON and LORD ALVANLEY; and it is impossible to read the judgment in *Ex parte Dewdney*, 15 Ves. 477, see p. 497, without perceiving the Lord Chancellor's disapprobation of such a rule. To the floating notion, which certainly has prevailed for a great length of time, countenanced by high authorities, that there is such a rule, must be opposed those authorities I have mentioned; to which may be added the declaration of a judge very conversant with the

law and practice of this court, that there is no such rule as to debts positively barred; distinguishing the case where the time having commenced, the death occurs before it has run out, and then the trust would keep it alive. I have paused upon this case, not from any doubt of the principle, but that I might have an opportunity of communicating with LORD REDESDALE, and collecting all the information that could be obtained upon a question of such magnitude, involving a general rule of great importance upon a subject that must very frequently occur; that it may be settled and publicly known if this clause is to have the effect that has been supposed, or, if not, that such a notion as to its operation may no longer remain afloat. With this view, I have given the question all possible attention; I have spared no pains in collecting every case in print, or that I could hear of, bearing upon it; I have traced the history of this supposed rule to its foundation, and have examined to the bottom the authorities on which it has been supported, many in number, and some not very correctly reported, which I have compared with the Register's Book. I shall go through those authorities. The result is, that, though there are many dicta, there is not one case the facts of which are distinctly stated, deciding that a debt actually barred by the statute is revived merely by virtue of this clause, either as to personal or real estate; and as to the former it has not been argued. In almost all the cases there was a recognition of the very debt, either express or by fair inference; or the death occurred before the statute had actually attached; and then, according to LORD REDESDALE's opinion, a trust being created for creditors, the statute cannot attach, and the lapse of time forms no bar."

In the case of *Roosevelt v. Marks*, *ante*, KENT, C. J., cited with approbation the opinion of the Vice-Chancellor in *Burke v. Jones*, and said: "This decision appears to me well founded upon principle, and upon the construction of the authorities, and to put an end to this litigious question." And he decided that a devise of real and personal estate for the payment

promise to pay; and if that condition exists, the law will imply a

of just debts does not revive a debt barred by the statute of limitations. A testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of £1,500 sterling towards his debts; directed sundry tracts of land to be sold, and the moneys arising therefrom, as well as from loan-office certificates, or otherwise (after payment of his just debts), to be equally divided among his six sons. On a bill brought by one of the creditors of the testator, the statute of limitations being pleaded, and the complainant not having shown that he came within any of the exceptions of the act, it was held that the statute ought not to operate to prevent a recovery of so much of the specific fund as remained undisposed of, but that it would be a bar to a recovery out of the general fund. *Lewis v. Bacon*, 3 H. & M. (Va.) 89. The case of *Swann v. Sewell*, 2 B. & Ald. 759, was an action of assumpsit on a promissory note. Plea, 1st, the general issue; 2dly, the statute of limitations; but there was no plea or notice of set-off. It was proved that on the plaintiff's showing the defendant the note within six years, the latter said, "You owe me more money; I have a set-off against it." Held, that that was not a sufficient acknowledgment within six years to take the case out of the statute of limitations. HOLROYD, J., said: "How can it be contended that an assertion by a defendant that he has a good defence is an acknowledgment of the debt?" Where a party revives a debt barred by the statute of limitations, by paying it into court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest. *Collyer v. Willcock*, 4 Bing. 315. The defendant, being arrested on a note, said that he owed the plaintiff the money and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken these steps, he (defendant) would keep him out of it as long as he could. Held, that this was not such an acknowledgment as would take the case out of the statute of limitations. *Fries v. Boisselet*, 9 S. & R. (Penn.) 128. After suit brought on a promissory note,

the defendant admitted he had given such a note, but said he had paid it. Held, that this was not such an acknowledgment of a subsisting debt as will avoid the plea of the statute of limitations. *Smith v. Freel*, Addis. (Penn.) 291. Though a slight acknowledgment of the debt, if sufficient to raise an implied promise to pay it, will take a case out of the statute, yet if the debtor qualifies his acknowledgment in such a manner as to show that it was his intention not to pay, the statute will take effect. Therefore, where a debtor, on being called on for payment of a promissory note more than six years after it became due, said, that as there had been no money transactions between himself and the plaintiff previous to or during the year 1812, he was surprised at the demand; that he owed him nothing on the account mentioned, and referred him to his final discharge under the act of 13th March, 1812, it was held, that the debt was barred by the act of limitations, notwithstanding the act of 1812 was unconstitutional and void. *Hudson v. Carey*, 11 S. & R. (Penn.) 10; *Bailey v. Bailey*, 14 id. 195; *Eckert v. Wilson*, 12 id. 393.

A testator being indebted to one of his children, devised to her £50, to be paid at the expiration of ten years after his decease, and proceeded thus: "It is my further mind and will, that if any of my said children shall, after my decease, make any demand against my executors, for any services they may have done or performed for me, in my lifetime, then instead of the bequest mentioned to be given to such child or children, so exhibiting any such demand or charge, I give the sum of fifteen shillings apiece, and no more." In an action against the executor, by a child, for services rendered to the testator, to which the statute of limitations was pleaded, the court held that the above clauses in the will did not prevent the statute of limitations from running. *Cresman v. Caster*, 2 Browne (Penn.), 128.

In a South Carolina case, it appeared that Lance and Parker having unsettled accounts, Parker gave Lance a stipulation in these words: "If, in the settlement of accounts between Mr. Lambert Lance and

promise without its having been actually or expressly made.¹ There

myself, any balance should appear to be due him, I hereby assume payment thereof so as to prevent its being barred by the operation of the limitation act." Upon suit brought against Parker, he pleaded *non assumpsit infra quatuor annos*; and issue being taken upon the replication thereto, it was held, that this stipulation bound only for four years from its date, and that the statute might after that period be pleaded by the party who gave it. *Lance v. Parker*, 1 Rep. Const. Ct. (S. C.) 168.

Where an account on its face is barred by the statute of limitations, but the plaintiff enters a credit of recent date, which the defendant disavows, such entry, without some further proof, will not take the case out of the statute. *Taylor v. McDonald*, 2 Rep. Const. Ct. (S. C.) 178. A person had given a note against which the statute of limitations had run, and upon the note being presented to him for payment, seized it, saying, "I am glad I have got my hands on it. I have paid it long ago." This is not such an acknowledgment as will take a case out of the statute. *Gray v. Kernahan*, 2 Rep. Const. Ct. (S. C.) 65. In the case of *Coltman v. Marsh*, 3 Taunt. 380, the defendant pleaded the statute of limitations; the evidence

given at the trial was, that the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since;" held, that this was not to be left to the jury as evidence of a sufficient acknowledgment to take a debt out of the statute of limitations. *Hellings v. Shaw*, 7 Taunt. 608.

A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. *Quære*, whether in order to take the case out of the statute of limitations, evidence is admissible to show that the bill had never in fact been paid in this manner. *Semble*, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly, that it is impossible it could be discharged in any other manner than that specified. *Beale v. Nind*, 4 B. & Ald. 566. Where the defendant in an action on a promissory note to which the defence was the statute of limitations, had said that such note had been paid by the services of his wife in the dwelling-house

¹ *Hall v. Bryan*, 50 Md. 194. But there must be something more than a mere mention of the debt, without questioning the indebtedness. There must be an unqualified, direct admission of a present subsisting debt. *Hanson v. Towle*, 19 Kan. 273. It is well settled that an acknowledgment need not be wholly by words, but may be established by any act or words that necessarily presuppose or admit the existence of a debt and an obligation to pay it. *Bamfield v. Tupper*, 7 Exch. 27; *Purdon v. Purdon*, 10 M. & W. 361. Thus, in the cases cited *ante*, as well as those following, the payment of interest was held to operate as an admission of a subsisting debt still due, sufficient to remove the bar of the statute. *Sanford v. Hayes*, 19 Conn. 591; *Clementson v. Williams*, 8 Cranch (U. S.), 74; *Lord v. Shaler*, 3 Conn. 151. And this is so whether the interest accrued before or after the

principal was barred by the statute. *Fryeburgh v. Osgood*, 21 Me. 176. But payment of the principal will not operate as an acknowledgment of the interest. *Collyer v. Willcock*, 4 Bing. 315. So a payment on account, or a part payment of the principal of a debt, will generally operate as an acknowledgment of the whole debt. *Hooper v. Stevens*, 4 Ad. & El. 71; *Smith v. Sims*, 9 Ga. 80; *Sibley v. Lambert*, 30 Me. 253; *Raudan v. Tobey*, 11 How. (U. S.) 493; *Strong v. McCormick*, 5 Vt. 338; *Turney v. Dodwell*, 3 El. & Bl. 136; *Jones v. Jones*, 21 N. H. 219; *Illsley v. Jewett*, 2 Met. (Mass.) 168; *State Bank v. Waddy*, 5 Ark. 348; *Badger v. Arch*, 10 Exch. 333. And generally all the attendant circumstances should be considered in order to arrive at the real intention of the debtor by what he said.

must not be any uncertainty as to the particular debt to which the

of the plaintiff, and the plaintiff proved that payment had not so been made, it was held that this did not amount to an acknowledgment of the debt sufficient to take it out of the statute. *BRISTOL, J.*, in delivering the opinion of the court, said: "A debt being barred by the statute of limitations, the defendant is entitled to take advantage of it unless he consents to relinquish its protection, either expressly or by evident implication. The truth or falsehood of the defendant's declaration as to paying the demand appears to me immaterial to the true point of inquiry, which in all such cases should be, whether the defendant has, by an express or implied recognition of the debt, voluntarily renounced the protection of the statute. We think this should depend on the defendant himself, and on his own declarations; not on disproving the truth of these declarations, and thereby converting what was intended as an absolute denial of any indebtedness into an acknowledgment of such debt, and a promise to pay it. It might as well be claimed, if a defendant denied the execution of a note barred by the statute of limitations, and the plaintiff could prove that he executed it, that the defendant had forfeited the protection of the statute. No intention to waive the protection of the statute can be inferred from the declarations of payment made by the defendant, even if those declarations are proved untrue. *Marshall v. Dalliber*, 5 Conn. 488; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195. In an action of assumpsit for goods sold and delivered, and on the money counts, the defendant pleaded the general issue and the statute of limitations. The defendant paid money into court generally. Held, that such payment did not take the case out of the statute. The court said: "The payment into court was equivalent to saying so much is due and no more. You cannot from such a negative imply an affirmative. The plaintiff, therefore, with respect to the rest of his demand, was in precisely the same situation as if that sum had not been paid in. *Long v. Grenville*, 3 B. & C. 10; *Shaddick v. Bennett*, 4 id. 769." In the case of *A'Court v. Cross*, 3 Bing. 329, the defendant being arrested on

a debt more than six years old, said: "I know that I owe the money; but the bill that I gave is on a three-penny receipt stamp, and I will never pay it." Held, that this was not such an acknowledgment of the debt as would take the case out of the statute of limitations. *BEST, C. J.*, said: "I am sorry to be obliged to admit that the courts of justice have been deservedly censured for their vacillating decisions on 21 Jac. I. c. 16. When by distinctions and refinements, which, *LORD MANSFIELD* says, the common sense of mankind cannot keep pace with, any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute; or, if it be in the common law, settling it on some broad and intelligible principle. But this must be done with caution, otherwise we shall increase the confusion that we attempt to get rid of; the authority of no one court is sufficient in such a case. I will therefore go no further to-day than I am authorized to go by the authority of modern decisions." "Christianity forbids us to attempt enforcing the payment of a debt, which time and misfortune have rendered the debtor unable to discharge. The legislature thought that if a demand was not attempted to be enforced for six years some good excuse for the non-payment might be presumed, and took away the legal powers of recovering it. I think, if I were now sitting in the Exchequer Chamber, I should say that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it the protection of the statute of limitations. But I shall not, after the cases that have been decided, be disposed to go so far in this court without consulting the judges of the other courts. There are many cases from which it may be collected, that if there be anything said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute of limitations."

In the case of *Tanner v. Smart*, 6 B. & C. 608, *LORD TENTERDEN, C. J.*, said: "There are, undoubtedly, authorities that the statute is founded on the pre-

admission applies. It must be so distinct and unambiguous as to

sumption of payment, that whatever repels that presumption is an answer to the statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt; and that though such an acknowledgment is accompanied with only a conditional promise, or even a refusal to pay, the law considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the statute; and if these authorities be unquestionable, the verdict which has been given for the plaintiff ought to stand, and the rule for a new trial ought to be discharged. I refer to the cases of *Yea v. Fouraker*, 2 Burr. 1099; *Lloyd v. Maund*, 2 T. R. 760; *Bryan v. Horseman*, 4 East, 599; *Leaper v. Tatton*, 16 East, 420; *Douthwaite v. Tibbutt*, 5 M. & S. 75; *Frost v. Bengough*, 1 Bing. 266; *Rowcroft v. Lomas*, 4 M. & S. 457; *Swan v. Sowell*, 2 B. & Ald. 759; *Mountstephen v. Brooke*, 3 B. & Ald. 141. But if there are conflicting authorities upon the point, if the principles upon which the authorities I have mentioned are founded appear to be doubtful, and the opposite authorities more consonant to legal rules, we ought at least to grant a new trial, that the opportunity may be offered of having the decision of a court of error upon the point, and that for the future we may have a correct standard by which to act." And the rule for a new trial was made absolute. In assumpsit for fees as an attorney at law, the defendant pleaded the statute of limitations in bar of the action; at the trial the plaintiff proved a letter received from the defendant after the services performed, but more than six years before the commencement of the suit, in which he promised to pay for the services claimed in this suit, and also proved that within six years past the defendant said to him, "If I owe you anything on that claim I will pay you; but I owe you nothing." Held, that this was not sufficient evidence of a new promise to avoid the bar of the statute of limitations. *Parley v. Little*, 3 Me. 97.

In an action of assumpsit for money due on an accountable receipt, the statute of limitations was pleaded, and the plaintiff,

in order to take the case out of the statute, called a witness, who proved that he called upon the defendant and showed him the receipt, and asked him if he knew anything of it, to which the defendant answered, "Yes, I know all about it." The witness then asked him for the amount, to which defendant answered, "It was not worth a penny, he should never pay it." He admitted his signature to the receipt. The witness said, "Perhaps you have paid it;" defendant answered, "No, never, he never had, and never would;" and added, "Besides, it is out of date, and no law shall make me pay it." Held, that this evidence was not sufficient to charge the defendant with the debt, for there was no evidence, but the contrary, that the debt ever existed. *Rowcroft v. Lomas*, 4 M. & S. 457. A qualified admission by a party who relies on an objection, which would at any time have been a good defence to the action, does not take a case out of the statute of limitations. *De La Torre v. Barclay*, 1 Starkie, 6. To a demand for the charges of preparing an annuity deed, the defendant said, "I thought I had paid it, but I have been in so much trouble since, that I really do not recollect it." The plaintiff answered, "You know the price of the annuity was paid you in a £1,000 bank-note, which you changed at Badcock's." The defendant made no answer. Held, that this was not a sufficient acknowledgment of the debt to deprive the defendant of the benefit of his plea of the statute of limitations. *Hellings v. Shaw*, 7 Taunt. 608. A mere demand of a debt, without process, or any acknowledgment, is not sufficient to take the case out of the statute of limitations. *Hodley v. Healey*, 1 V. & B. 540. In the case of *Scull v. Wallace*, 15 S. & R. (Penn.) 231, the plaintiff below examined Scull, one of the defendants, as a witness, without objection. All the defendants pleaded the act of limitations; and it was held that the plaintiff would not be permitted, for the purpose of avoiding that plea, to ask Scull whether it was his intent to plead the act of limitations. And although the question was left undetermined, whether an administrator may charge the estate of

remove all hesitation in regard to the debtor's meaning.¹ It is not

his intestate, by refusing to plead the act of limitations, although his co-administrator insists on pleading it, yet it was decided, that if one stands neutral the others may plead it. TILGHMAN, C. J., said: "A very important point was raised by the defendant's counsel, which it is unnecessary to decide, because it does not fairly arise from the evidence. This point was, whether one administrator may charge the estate by refusing to plead the act of limitations although his co-administrator insist on pleading it. But it is clear enough by the evidence that Mr. Scull, although he did not desire to plead the act, and did not think it proper that it should be pleaded, was determined to act in such a manner as should leave the widow of William Irwin at liberty to avail the estate of that plea if she judged it right to do so. Mr. M'Donald, a witness for the plaintiff, swore that Scull told him he had no doubt that the estate of Irwin was indebted to Wallace, but how much he could not tell. But in the same conversation Scull observed that Mrs. Irwin was outrageous about Wallace's claim, and was determined to plead the statute of limitations. She said she would not pay a cent of it. Scull said he would leave the matter to her altogether, and have nothing to do with it. And this was confirmed by Scull in his own testimony in the strongest terms; for he swore that he never had an idea of depriving the other administrators of the benefit of the act, if they chose to avail themselves of it. There was no contradiction in the evidence on this point, and the defendant's counsel had a right to the court's opinion whether Scull's acknowledgment, taking it altogether, took the case out of the act of limitations. The law has been well settled by repeated decisions of this court. The principle is this: A slight acknowledgment of an existing debt is sufficient to take the case out of the statute, because the jury may and ought to presume a new promise; but the acknowledgment is to be taken altogether, and if, on the whole, it is inconsistent with a new promise, no new promise shall be implied, and the statute shall bar. This is such plain common sense that it is

a wonder any opinion should ever have been held to the contrary. Now, to apply the law to the evidence in this case, Mr. Scull's confession, considered *in toto*, is altogether inconsistent with a promise to pay; because he expressly declared that Mrs. Irwin was determined to plead the statute, and he would leave the matter to her, and would have nothing to do with it. I am at a loss for any argument to show the inconsistency of this acknowledgment with a promise to pay. The meaning is so plain that it is impossible to misunderstand it."

In England, all questions about the sufficiency of acknowledgments to revive claims barred by the statute of limitations were put at rest by Stat. 8 Geo. IV.

¹ MERCUR, J., in *Palmer v. Gillespie*, 90 Penn. St. 363. In *Fiske v. Hibbard*, 45 N. Y. Superior Ct. 831, the debtor wrote the plaintiff as follows: "I am well aware that I owe you for money borrowed. As you have the figures, I wish you would at your leisure make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I desire to act honestly toward everybody;" and it was held that this was a sufficient acknowledgment of a present indebtedness from which a promise to pay may be implied. In *Webb v. Carter*, 62 Ga. 415, a letter from the defendant to the plaintiff enclosing five dollars, to be indorsed on the note, and stating, "My son James will wind up my business, with instructions to pay you," was held to be a written acknowledgment sufficient to support a promise to pay. But in *Eckford v. Evans*, 56 Miss. 18, a letter as follows, "I am going to Aberdeen to-morrow, and will send fifty dollars, which is all I can spare at present," was held too indefinite, and not sufficient as an acknowledgment of the debt in suit to affect the operation of the statute. But in *Bayliss v. Street*, 51 Iowa, 627, a letter addressed by the maker of the note in suit, stating that he "hoped to pay," and that in case of his death he had provided for payment out of his life insurance, was held sufficient. In *Treadway v. Treadway*, 5 Ill. App. 478, a debtor was asked by his creditor to give

essential that the amount of the debt should be stated or even referred to. It is sufficient if the acknowledgment admits *something* to be due upon a specific claim, and parol evidence is admissible to prove the amount;¹ and the same is also true as to the nature of

him his note for a debt barred by the statute, to which he replied that "it makes no difference, it is all in the family;" and it was held not sufficient to found a promise upon. *Fries v. Boisselet*, 9 S. & R. (Penn.) 128; *Bailey v. Bailey*, 14 id. 195; *Allison v. James*, 9 Watts (Penn.), 380; *Gilkyson v. Larue*, 6 W. & S. (Penn.) 218; *Hazlebaker v. Reeves*, 9 Penn. 264; *Davis v. Steiner*, 14 Penn. St. 275; *Johns v. Lantz*, 62 id. 324. In the last case, it was said, "No case, however, has ever gone the length of saying that there must be an express promise to pay in terms." *Watson v. Stern*, 26 Penn. St. 121, and *Senseman v. Hershman*, 84 id. 83, declare the rule to be as stated in the cases cited. *Miller v. Baschore*, 85 id. 356, was not intended to overrule the long line of preceding cases. The generality of the language therein used must therefore not be understood as requiring an express promise, but a promise that may be clearly implied. A promise by the debtor, when spoken to about the debt by his creditor, that he would settle it, would pay it, would see to it that it was correct, was held sufficient to take the debt out of the statute. *Palmer v. Gillespie*, *ante*. In *Bloom v. Kern*, 30 La. An. part 2, 1263, it was held that letters from the debtor to the creditor, declaring his inability to pay, and asking for indulgence, were sufficient to interrupt the statute, both as to the principal debtor and his surety. But see *Cook v. Cook*, 10 Heisk. (Tenn.) 664, where it was held that in order to suspend the statute a request for delay must stipulate for a particular time. In *Leigh v. Linthicum*, 30 Tex. 100, a letter in the following words was held not sufficient to remove the statute bar, because it did not show what part of the note was left unpaid, after deducting the credits: "You said something about a note you have. You are apprised I have an offset; when I see you we will adjust the matter, and whatever is due on the note I will pay." The words, "I feel ashamed of it standing so

long," in a letter referring to a debt, held not sufficient. *Wilcox v. Williams*, 5 Nev. 206. A pledge of stock to secure a debt was held a continuous acknowledgment of the indebtedness that prevents the statute from running. *Citizen's Bank v. Johnson*, 21 La. An. 128. But this doctrine is questionable. The true rule undoubtedly is, that while the statute runs upon the debt, the lien upon the stock for the amount of the debt still remains; and after the debt is barred, the pledgee can look only to the stock for payment.

¹ *Hazlebaker v. Reeves*, 12 Penn. St. 264; *Davis v. Steiner*, 14 id. 275; *Moore v. Hyman*, 13 Ired. (N. C.) L. 272; *Hart v. Boyd*, 54 Miss. 547. But unless the promise or acknowledgment is for a sum certain, it must be for that which can be reduced to a certainty. *McRae v. Leary*, 1 Jones (N. C.) L. 91; *Shaw v. Allen*, Bush. (N. C.) L. 58; *Peterson v. Ellicott*, 9 Md. 52; *Thompson v. French*, 10 Yerg. (Tenn.) 453; *Hale v. Hale*, 4 Humph. (Tenn.) 183; *Hunter v. Kettredge*, 41 Vt. 359. In *Starkie on Evidence*, vol. ii. p. 666, 3d ed., the following is the rule deduced from the recent cases: "From the late decisions on the effect of an acknowledgment under the provisions of the statute 21 Jac. I. c. 19, where all the former cases were brought under consideration, the result seems to be that, to repel the limiting power of the statute, it must either amount to an express promise or to so clear an admission of a still subsisting liability, that a promise must necessarily be implied." In *Colledge v. Horn*, 3 Bing. 119, the letter was this: "I have received yours respecting the plaintiff's demand; it is not a just one; I am ready to settle the account whenever the plaintiff thinks proper to meet on the business; I am not in his debt £90, nor anything like that sum; shall be happy to settle the difference by his meeting me." There the party uses the terms, "shall be happy to settle the difference," which admits something due; and that parol evidence may be given

the indebtedness.¹ But it must be shown unmistakably to relate to the particular debt or demand which is sought to be revived by it, or the acknowledgment must be attended by circumstances which will enable a jury to ascertain definitely what debt was intended ;² and an

to determine the amount cannot be disputed. So in *Waller v. Lacy*, 1 M. & G. 54, the defendant having a claim against the plaintiff, the latter wrote at the foot of his bill, "By Mr. Lacy's bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request above I send you my bill, which I will thank you to peruse, and, if correct, favor me with a bill for the balance." The word "balance" necessarily implied that something was due. The cases have not gone further than that an absolute admission of some debt being due is sufficient, and that that admission may be coupled with evidence to prove the amount. *Lechmere v. Fletcher*, 1 C. & M. 623. In *Cheslyn v. Dalby*, 4 Y. & C. 238, a deed executed by A. and B. recited that A. was indebted in various sums, the amount of which was not yet ascertained, and that A. was willing to pay B. the amount which might appear to be due in respect of such sums, such sums to be ascertained and paid as therein mentioned, and the deed afterward provided for taking the accounts by the arbitration of two persons named therein ; and it was held that, notwithstanding the clause as to arbitration, the recital amounted to an absolute promise to pay the amount when ascertained, and that, when coupled with external parol proof as to the amount there was a sufficient acknowledgment to bar the statute. ALDERSON, B., said : "I apprehend it must be considered as fully established that a general promise in writing to pay, not specifying any amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the statute of limitations." *Morrell v. Frith*, 3 M. & W. 402. In *Spong v. Wright*, 9 M. & W. 629, the plaintiff brought an action of debt on a bill of exchange for £20. The defendant pleaded, first, except as to £10 11s., parcel, &c. a set-off for board and lodging ; and as to the sum of £10 11s., payment of that sum into court. Replication, that the alleged debts and causes of set-off did not accrue within six years

before the commencement of the suit, concluding to the country ; to which the defendant, by his rejoinder, added the similiter. At the trial, the plaintiff having proved his case, and the defendant his set-off, the latter put in a letter from the plaintiff to the defendant, in which the following passages were relied upon to take the case out of the statute : "Before closing this, I have to request you will be pleased to send me in any bill or what demand you have to make on me, and, if just, I shall not give you the trouble of going to law. If you refer to your books, you will find the last payment I made you was in May, 1839 ; the day I have forgot. I shall leave town to-morrow, but shall be back in a few days, for a month, and if you will bring my bill in here to me by eleven, I shall be at your service ;" and this was held not a sufficient admission to take the case out of the statute of limitations.

¹ *Dickinson v. Hatfield*, 1 M. & R. 141.

² In order to revive a note, which on its face is barred by the statute of limitations, by a new promise, such new promise must so plainly and clearly refer to or describe the very note in question as to identify it with reasonable certainty. *Gartrell v. Linn*, 79 Ga. 702 ; *Switzer v. Noffsinger*, 82 Va. 518 ; *Martin v. Broach*, 6 Ga. 21 ; *Arey v. Stephenson*, 11 Ired. (N. C.) L. 86 ; *Robbins v. Farley*, 2 Strobb. (S. C.) 348 ; *Conway v. Reyburn*, 22 Ark. 290 ; *Lockhart v. Eaves, Dudley* (S. C.) 321 ; *Buckingham v. Smith*, 28 Conn. 453 ; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674 ; *Stafford v. Bryan*, 3 Wend. (N. Y.) 582 ; *McMullen v. Grannis*, 10 N. Y. Leg. Obs. 57. It must refer distinctly and specifically to the original debt. *Dobson v. Quantrel*, 1 Phila. (Penn.) 204 ; *Clark v. Maguire*, 35 Penn. St. 259 ; *Tracy v. Newell*, 3 Leg. & Ins. Rep. 50 ; *Cook v. Martin*, 29 Conn. 63 ; *Lord v. Harvey*, 3 id. 370.

The necessity for a new promise, or of evidence from which a new promise may be implied, for the purpose of avoiding a plea

acknowledgement of an indebtedness upon the aggregate of several distinct classes of claims, but which neither refers to any particular

of the statute of limitations, is as well settled in England as in this country ; and although an express or implied acknowledgment of the debt will suffice, *Gardner v. M'Mahon*, 3 Q. B. 561 ; *Walter v. Lacy*, 1 M. & G. 54 ; *Dodson v. Mackey*, 8 Ad. & El. 225, yet there can be no recovery if the acknowledgment is accompanied with any qualification tending to rebut the implication of a promise of payment, which would otherwise arise, *Routledge v. Ramsay*, id. 221 ; *Spong v. Wright*, 9 M. & W. 629 ; *Hart v. Prendergast*, 14 id. 741 ; *Cripps v. Davis*, 12 id. 159 ; *Morrell v. Frith*, 8 id. 402. The operation and extent of the rule in that country will best appear from the language of LORD DENMAN, in deciding the case of *Bateman v. Pinder*, 3 Q. B. 574, where an attempt was made, on the authority of *Yea v. Fouraker*, 2 Burr. 1099, to sustain a traverse of a plea of the statute by evidence of a payment by the defendant since action brought. "This case, when we consider it," said his Lordship, "is very clear. *Yea v. Fouraker* is acknowledged as an authority in *Thornton v. Illingworth* ; but the judges distinguish it from that case. *Yea v. Fouraker* was rightly decided, if, as BAYLEY and HOLROYD, JJ., lay it down in the subsequent case, the statute of limitations takes effect upon the ground that after a certain time it shall be presumed that the debt has been discharged. For, if that be so, an acknowledgment made at any time will rebut that presumption. But in *Tanner v. Smart*, 6 B. & C. 602, the earlier cases were revised, and the doctrine as to presumption of payment repudiated ; and it was held that, to prevent the operation of the statute, a distinct promise was necessary. That promise must be before action brought." The courts of South Carolina, however, distinguish between those cases in which the debt is barred before the admission, and those in which it is not, and hold much slighter evidence sufficient in the latter case than in the former. *Young v. Monpoey*, 2 Bailey, 278 ; *Bowdre v. Hampton*, 6 Rich. (S. C.) 208 ; *Deloach v. Turner*, 7 id. 143. This view of the law is unquestionably at variance

with the general course of decision, and can hardly be sustained on principle. To continue the obligation of a debt requires an express or implied promise, and nothing more is requisite to revive it after it has been extinguished. A replication of a new promise, or of a new cause of action within six years, is a sufficient answer to a plea of the statute under all circumstances, and identity of allegation would seem to imply identity of proof. In *Case v. Cushman*, 1 Penn. St. 241, KENNEDY, J., inclined to the opposite view.

The acknowledgment must appear, or be shown to relate to the debt, which is the cause of action, *Stafford v. Bryan*, 3 Wend. (N. Y.) 535 ; *Martin v. Broach*, 6 Ga. 21 ; *Lockhart v. Eaves*, Dudley (S. C.), 321 ; *Airey v. Stevenson*, 11 Ired. (N. C.) 86 ; *Brailsford v. James*, 3 Strobb. (S. C.) 171 ; *Boxley v. Gayle*, 19 Ala. 151 ; but will be presumed to refer to that proved by the creditor, unless another is shown to exist by his evidence or that of the debtor, *Bailey v. Crane*, 21 Pick. (Mass.) 323 ; *Woodbridge v. Allen*, 12 Met. (Mass.) 470 ; *Coles v. Kelsey*, 2 Tex. 541 ; *Brown v. The State Bank*, 5 Ark. 134 ; *Wood v. Wylds*, 6 id. 754 ; *Guy v. Tama*, 6 Gill (Md.), 82 ; because, if there is no other debt, there is no need of proof ; and if there is, the burden rests with him who maintains the affirmative. Some of the cases go further in language, if not in decision, and require specific proof of identity in all cases, either from the words of the acknowledgment or from other sources, *Robinson v. Fraley*, 2 Strobb. (S. C.) 348 ; *Prey v. Garcelon*, 17 Me. 145 ; *Martin v. Broach*, *ante* ; and there can be little doubt that an unsettled account, containing different charges or items, will not be taken out of the statute by a general admission not naming the amount due on the whole, nor referring to any specific portion, *Hoff v. Richardson*, 19 Penn. St. 388 ; *Clark v. Dutcher*, 9 Cow. (N. Y.) 674 ; because the ambiguity appears under these circumstances, on the face of the evidence : and such is unquestionably the law when part of the plaintiff's demand is barred by the statute, and part not, unless the acknowl-

claim, nor to one debt only, has been held not sufficient to take any

edgment is so worded as to refer manifestly to the former as well as to the latter, *Morgan v. Walton*, 4 Penn. St. 321. An acknowledgment which is vague and ambiguous in itself is necessarily insufficient, *Harbold v. Kuntz*, 16 Penn. St. 210; *Shuber v. Suter*, 10 id. 308; *Farley v. Kustenbader*, 3 id. 418; and the result must be the same, where the ambiguity or uncertainty arises from the nature of that to which it refers; but whatever may have been said, it has not yet been decided, that a single and liquidated debt will not be revived by a general acknowledgment or promise of payment. Certainty is essentially requisite in all cases to a good cause of action; but an acknowledgment will be sufficient, if it can be reduced to certainty by applying it to that to which it relates. *Smith v. Leeper*, 10 Ired. (N. C.) 86; *Moore v. Hyman*, 13 id. 272.

When the debt is certain and liquidated, nothing need be said in the acknowledgment about its amount, *Thompson v. French*, 10 Yerg. (Tenn.) 453; *Hazlebaker v. Reeves*, 2 Jones (N. C.), 264; *Davis v. Steiner*, 15 Penn. St. 275; *Dinsmore v. Dinsmore*, 8 Me. 433; *Williams v. Griffith*, 3 Exch. 335; unless there is something in the language of the acknowledgment itself, or in the circumstances under which it is made, to show that the debtor meant to reserve the right to adjust or settle the sum to be paid himself, instead of leaving it to be determined in the manner prescribed by the law, which may, under the circumstances, and after the lapse of time, be inadequate to justice. Thus a promise or acknowledgment which speaks of the debt as unliquidated, *Peebles v. Mason*, 2 Dev. (N. C.) 337; *Harbold v. Kuntz*, 16 Penn. St. 210; or merely expresses an intention to pay whatever may prove to be due upon further examination, as when the debtor promises to have a settlement of the account, or to refer it to arbitrators, *Sutton v. Burruss*, 9 Leigh (Va.), 381; *Bell v. Crawford*, 8 Gratt. (Va.) 110; *Moore v. Hyman*, 13 Ired. (N. C.) 272; *Morgan v. Walton*, 4 Penn. St., will be interpreted in its more obvious sense, of a willingness to come to terms with the creditor, and not deprive himself of the protection of the

statute. In like manner, great injustice might result if a general acknowledgment that something is due on an unliquidated account for goods sold or services rendered at different times, during a long-continued period, were held sufficient to remove the bar of the statute, and authorize a recovery for the whole of the demand. *Suter v. Shuber*, 23 Penn. St. 308. But the question is one purely of intention, and depends wholly on the meaning of the debtor as deduced from his words and actions in connection with all the circumstances of the case. Thus, a promise to settle a debt may be given in such a way as to show that the debtor meant to bind himself to pay it; and words which may have been wholly insufficient when applied to an unsettled account, may have a different signification when spoken of a debt which has been liquidated or reduced to certainty. *Aylett v. Robinson*, 9 Leigh (Va.), 45; *Brookes v. Chesley*, 4 Gill (Md.), 205; *Smith v. Leeper*, 10 Ired. (N. C.) 86; *Smellwood v. Smellwood*, 1 D. & B. (N. C.) 335; *Barnard v. Bartholomew*, 21 Pick. (Mass.) 323.

The admission must express or imply a willingness to assume an immediate obligation, even if it defers the time of performance, and not be limited to a mere expression of hope or anticipation. *Spong v. Wright*, 9 M. & W. 629; *Hart v. Prendergast*, 14 id. 741; *Marseilles v. Kenton's Executors*, 17 Penn. St. 238. Thus a promise or attempt to make an arrangement for the payment of a debt which is not carried out or perfected will not rebut a plea of the statute, because it shows that the defendant, instead of being willing to meet the debt as it stands, contemplates paying it in some other form or manner not yet determined on. *The Kensington Bank v. Patton*, 14 Penn. St. 479; *Oakes v. Mitchell*, 15 Me. 360.

The dicta in some of these cases, if not the cases themselves, would lead to the conclusion, that the most unequivocal promise to pay an unliquidated debt will not take it out of the statute, unless the amount actually due, or which the debtor is willing to pay, is fixed by the terms of the promise, or the subsequent language

one of the claims out of the statute.¹ Thus, in the Connecticut case

or conduct of the parties, instead of being left to the determination of a jury on such evidence as may have survived the lapse of time. But it may be said that any acknowledgment of the existence of an outstanding debt, where there are no circumstances indicating a purpose not to pay it, is sufficient to raise a new promise, and remove the statute bar although it may be limited in terms to the amount which may prove to be due upon examination or settlement of the accounts between the parties. *Blake v. Parleman*, 13 Vt. 574; *Williams v. Finney*, 16 id. 297; *Macklin v. Macklin*, id. 193; *Cooper v. Parker*, 25 id. 502.

Whether the debt will be revived by an ambiguous promise or acknowledgment, depends upon what is really meant by the person who makes it, and this should ordinarily be left to the jury, under proper instructions from the court, *Guy v. Tama*, 6 Gill (Md.), 82; *Bird v. Gammon*, 3 Bing. N. C. 883; *Dorr v. Swartwout*, 1 Blatchf. (U. S. C. C.) 179; *Wainman v. Kynman*, 1 Exch. 118; however clear or certain the evidence may be, *White v. Jordan*, 27 Me. 370; and unless there is a plain want of evidence, when a verdict should be directed for the defendant, whether the evidence be in writing, *Marseilles v. Kenton*, 17 Penn. St. 239; *Morrell v. Frith*, 3 M. & W. 402; or merely verbal, *Hancock v. Bliss*, 7 Wend. (N. Y.) 206; *Sutton v. Burruss*, 9 Leigh (Va.), 381; *Bell v. Crawford*, *ante*; *Berghaus v. Calhoun*, 6 Watts (Penn.), 219; *Farley v. Kustenbader*, 3 Penn. St. 418; *Waples v. Layton*, 3 Harr. (Del.) 508; *Ventris v. Shaw*, 14 N. H. 422; *Bell v. Morrison*, 1 Pet. (U. S.) 351. On the other hand, it is unquestionably the duty of the jury to find for the plaintiff, on clear proof of a subsequent part payment or other unequivocal acknowledgment of the debt, and of the court to grant a new trial if they do not, *Jones v. Jones*, 21 N. H. 219; *Rucker v. Frazier*, 4 Strobb. (S. C.) 93; although the point is one on which juries usually require restraint rather than prompting.

In *Landes v. Roth*, 109 Penn. St. 621, it was held that a general admission that the debtor owes for a certain kind of

property, or for services, &c., is sufficient although the amount of the indebtedness is not stated. *Schmidt v. Pfan*, 114 Ill. 494; *Johnson v. Johnson*, 80 Ga. 260; *Gartnell v. Linn*, 79 Ga. 700; *Shipley v. Shilling*, 66 Md. 558; *Fletcher v. Gillan*, 62 Miss. 8; *Hussey v. Kirkman*, 95 N. C. 63; *Chapman's App.* 122 Penn. St. 331; *Montgomery v. Cunningham*, 104 Penn. St. 349; *Lawson v. McCartney*, 104 id. 349; *Cromad v. Stull*, 119 id. 91.

The acknowledgment must be made to the creditor or his agent and there is no theory upon which the doctrine of acknowledgments is predicated which will sustain the doctrine of those cases which hold that an acknowledgment to a stranger is sufficient. *Biddel v. Brizzolada*, 64 Cal. 354; *Duguid v. Sholfield*, 32 Gratt. (Va.) 803; *Maxwell v. Reilly*, 11 Lea (Tenn.), 307; *Henry v. Root*, 33 N. Y. 526; *In re Kendrick*, 107 N. Y. 104; *Libby v. Robinson*, 79 Me. 168; *Hargis v. Sewell*, 87 Ky. 63; *Kuner v. Crull*, 19 Ill. 89; *Niblack v. Goodman*, 67 Ind. 174; *Comer v. Allen*, 72 Ga. 1; *Fort Scott v. Hickman*, 112 U. S. 150; *Pearson v. Darrington*, 32 Ala. 227. Unless the acknowledgment is made to a stranger under such circumstances that the debtor can be said to have constituted such stranger his agent to communicate the acknowledgment to the creditor, in which case the acknowledgment is treated as having been made by the debtor himself *Wintertown v. Winterton*, 7 Hun (N. Y.), 230; *De Freest v. Warner*, 98 N. Y. 217; *Badhman v. Roller*, 9 Baxt. (Tenn.) 409; and it is also an indispensable requisite that such acknowledgment should have been communicated to the creditor within a reasonable time after it was made to such third person. *Abercrombie v. Butts*, 72 Ga. 74; *Allen v. Collins*, 73 Mo. 178; *Allen v. Collier*, 70 id. 138.

¹ *Buckingham v. Smith*, 23 Conn. 453, where several claims against a person are barred, a general acknowledgment of indebtedness will not take any of them out of the statute. *Smith v. Moulton*, 12 Minn. 352; *Walker v. Griggs*, 32 Ga. 119; *Boxley v. Gayle*, 19 Ala. 151.

last referred to, the defendant's intestate was indebted to the plaintiff upon several notes and also upon account; and in an action against the estate it was shown that the deceased had admitted that he owed the plaintiff upon "notes, receipts, and accounts," and that he was "determined to have a settlement of all their concerns," and admitted that he should owe him, after all. The plaintiff testified that the deceased, about four years before his death, said that "all he owed him would be settled up and made all right." This action was predicated upon one promissory note only, and the court held that it was insufficient to take the note in suit out of the statute.¹ It would be exceedingly unjust to hold that a person, by such an acknowledgment, admitted the validity, and impliedly promised to pay each of the several claims which a person held against him, so as to enable the person to maintain separate suits thereon, and relieve them from the operation of such general acknowledgment. The acknowledgment carries with it evidence that the debtor claimed to have an offset to the claims collectively, and in no sense can it be extended beyond a general balance resulting from a settlement of all the claims upon both sides; and a contrary doctrine would defeat the offset.

STORRS, J., in the Connecticut case² before referred to, very clearly set forth the effect of such an acknowledgment. "The burden of proving the requisite acknowledgment rested upon the plaintiff in this case, and the real question on the trial was, whether such an acknowledgment was shown by the declarations claimed to have been made by the defendant's intestate. Those declarations purported to refer to no particular claim or debt, but amounted only to an acknowledgment that a balance would be due upon a settlement or adjustment of several claims which the plaintiff held against him, and it was also shown by the plaintiff himself, that when those declarations were made he held several claims or evidences of debt against the intestate. If those declarations had purported to refer to the claim in question in this suit, or to refer to one claim only, and there had been evidence to show that there could have been no others to which they could have referred, they would clearly have constituted sufficient evidence of a new promise to pay the debt in question. But as they were acknowledgments only of a balance due on the aggregate of several claims, we are of opinion that they did

¹ In *Buckingham v. Smith*, *ante*, the court submitted the question to the jury, whether the acknowledgment related to the note in question; and upon hearing in the appellate court, it was held that this was all the plaintiff could ask. "We are strongly inclined to the opinion," said STORRS, J., "that the judge below should have excluded these declarations as inadmissible for the purposes for which they were offered, and that the course he took

was over-favorable to the plaintiff. We think that under such circumstances the question should not be submitted to the jury at all, and that the acknowledgment can only be held to apply to the balance of all the claims upon settlement, and that the case did not come within the rule adopted in *Lloyd v. Maund*, 2 T. R. 761; *Frost v. Bengough*, 1 Bing. 266; or *Beale v. Nind*, 4 B. & Ald. 571."

² *Buckingham v. Smith*, *ante*.

not prove that there was anything due on any of them in particular, and therefore that they were not sufficient acknowledgments of the note declared on. If," continued he, "the declarations of the intestate claimed to be proved in this case amounted to an acknowledgment that the note in question was due, they would also amount to a similar acknowledgment as to each of the claims held against him, and would enable the latter to recover all of them. This would obviously be a perversion of the import of those declarations."¹ Instances may arise where a general acknowledgment of indebtedness upon several demands will be sufficient; but where the acknowledgment relates to a balance upon a settlement, the demands must be such as can be and are embraced in one action, so that the balance can be ascertained and recovered under one head. Thus, in a Connecticut case,² the plaintiff held two independent claims against the defendant; one a note, and the other an account, a statement of which was written down on one piece of paper and presented to the defendant soon after they became due, and were admitted by him, as so presented. Five years afterward the defendant made a general acknowledgment of indebtedness, and promised to pay him what he owed him. In an action of assumpsit upon the note and account the defendant pleaded the statute in bar, and the court held that the evidence of the acknowledgment should not be rejected, because it was too general and indefinite, but that the question of its application was for the jury.³ In that case no difficulty could

¹ See *Clark v. Maguire*, 35 Penn. St. 259; *Cook v. Martin*, 29 Conn. 63; *Conway v. Rayburn*, 22 Ark. 290; *Arey v. Stephenson*, 11 Ired. (N. C.) L. 86; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Martin v. Broach*, 6 Ga. 21; *Sands v. Gileston*, 15 Johns. (N. Y.) 511; *Sherrod v. Bennett*, 8 Ired. (N. C.) L. 309; *Braitsford v. James*, 3 Strobb. (S. C.) 171.

² *Cook v. Martin*, 29 Conn. 60.

³ "If," says PARKER, C. J., in *Whitney v. Bigelow*, 4 Pick. (Mass.) 412, "there be words of acknowledgment or promise, without declared reference to the debt in question, it is for the jury to determine, from the circumstances in evidence, whether reference was had to the debt which is sought to be recovered." In *Martin v. Broach*, 6 Ga. 21, it was held that where there is no dispute as to the facts which go to prove the acknowledgment or new promise, the question is one of law for the court; but where there is any dispute, the question is a mixed one of law and fact for the jury. In *Lloyd v. Maund*, 2 T. R. 761, the court seemed to regard the question as to whether an am-

biguous letter, neither expressly admitting or denying the debt, amounted to an acknowledgment, as one of fact for the jury. That was an action of assumpsit for work and labor by the plaintiff as an attorney, to which the defendant pleaded the general issue and the statute of limitations. At the trial, before LORD KENYON, the plaintiff produced the following letter, written to his attorney by the defendant in January, 1788, in order to take this case out of the statute of limitations: "I have lately been served by Mr. Meredith Price with a writ at the suit of one Lloyd. I am at a loss to know whether was it your orders, or was it some other of the same name. For several reasons, I cannot suppose that an old particular friend would ever be guilty of causing an action to be commenced, without first advising him on it. I believe that you have had no cause to contradict my saying that I always served you on all occasions that ever lay in my power; therefore I flatter myself that you have no concern in this business. However, if it should appear to the contrary, I must beg leave to inform you that

arise as to the application of the acknowledgment or the intention of the parties, as the defendant's attention was directed to both claims,

before I will pay any cost more than defending, I will absolutely take house in the liberty of Carmarthen, which I am fully satisfied will answer my expectations in business much better than here at Landover. As to Mr. P.'s views, I am no stranger at all to, and see through them without a spectacle; and as to your part, cannot expect to reap any benefit from that quarter, as he says you are indebted to him to the amount of £700. Therefore, if you seriously consider your own interest, you cannot be any gainer by endeavoring to injure a man who has always been your friend. However, you are to act as you think proper. As in respect to matters between you and me, they will be rectified, when I can settle my affairs, which I believe will now soon be. Mr. Rice Davies of Swansea has received positive orders from Mr. R. Price and son to sell the Erwastod and Combdy estates, and they will be advertised soon. I cannot believe that they will be sufficient to discharge the mortgage and Mr. Davies's demand, which amounts in cash lent and business done to £1000." But LORD KENYON, being of opinion that this did not amount to a promise or acknowledgment of the debt, so as to take it out of the statute of limitations, nonsuited the plaintiff.

A rule was obtained to show cause why the non-suit should not be set aside and a new trial granted. ASHHURST, J., said: "The only doubt in my mind is, whether the letter should not have been left to the jury, for them to form their opinion upon it. For it is certainly true that any acknowledgment will take the case out of the statute of limitations. Now, though this letter is written in ambiguous terms, there are some parts of it from which the jury might perhaps have inferred an acknowledgment of the debt. Throughout the whole of it the defendant does not deny the existence of the debt. He begins with reproaching the plaintiff for not giving him some information of his intention to bring an action against him; and then he says, in substance, 'that sooner than pay the costs he will go to jail.' And in another part he adds: 'As to the affair

between you and me, it will be rectified soon.' That, perhaps, does contain an insinuation that something was due. And I think the jury should have put their construction on it."

BULLER and GROSE, JJ., concurred.

As to whether the acknowledgment relates to the debt in suit is a question for the jury. *Beal v. Nind*, 4 B. & Ald. 571. In *Frost v. Benough*, 1 Bing. 266, where, in an action on a promissory note, the defendant pleaded the statute, and the plaintiff gave in evidence, as proof of acknowledgment within six years, a letter from the defendant to him, stating that "business called him to L., but should he be fortunate in his adventures, the plaintiff might depend on seeing him at R., otherwise that he must arrange matters with the plaintiff as circumstances would permit;" and the defendant did not show that there were any other matters besides the promissory note to which this letter could refer. It was held that it was properly left to the jury to decide whether such letter referred to the matter of the note, and was a sufficient acknowledgment to take the case out of the statute; and the jury having found in the affirmative, held that the verdict was conclusive. In *Lee v. Wyse*, 35 Conn. 384, this rule was well illustrated. In that case the defendants were members of a firm, and as such the defendant Wyse held the legal title to a farm as trustee of the firm. The plaintiff entered into a parol contract with A. for its purchase and paid part of the purchase-money to him. Subsequently the firm repudiated this contract and sold the farm to another party. Part of the plaintiff's demand was barred by the statute. A conversation between the plaintiff and one S., at which A. was present, and to which he assented, was held. S. said to the plaintiff, "When will you come up and settle?" to which the plaintiff replied, "In a day or two." S. rejoined, "That is right; and if W. owes you anything he will pay you." The court held that the question whether the acknowledgment was intended to apply to the whole account, or only to the part not barred by the statute, was for the jury.

and his acknowledgment related to an indebtedness growing out of both. "Indeed," says SANFORD, J., "the very terms of the inquiry and the answer include both of these demands. However numerous the items of indebtedness from one individual to another, they all together constitute what the former owes to the latter; and a promise of the latter to pay the former what he owes him, *prima facie*, if not conclusively, includes them all. The question is not whether the evidence offered was sufficient to prove that the defendant's acknowledgment and promise had reference to both of these items of demand or either of them, or not, but whether it would have conduced to prove such reference."¹ Therefore it may be said that, where there is an acknowledgment of an indebtedness, and there are several distinct debts, whether the amount thereof is certain or not, the question as to whether the acknowledgment related to all or to one or more of them, and to which, is for the jury;² and if the acknowledgment is sufficiently definite to enable them to refer it to the specific indebtedness intended, their finding will be sustained.³ But in these cases, as well as in the others before cited to this point, it will be observed that there could be no doubt as to the indebtedness intended. In one case⁴ it was shown that the only claim the plaintiff had against the defendant was the note in suit. In the Connecticut case⁵ the only indebtedness was for a balance upon the note and account in suit, a statement of which upon one piece of paper was presented to the defendant, and was before him when the acknowledgment was made, and his acknowledgment related to that. In an Iowa case⁶ the defendant wrote a letter to his creditor, referring to

Boyd v. Hurlburt, 41 Mo. 224. In Shaw v. Newell, 2 R. I. 264, the defendant being indebted on four notes, one of which was barred by the statute, the promisee, exhibiting four slips of paper, said to him, "I have got the interest reckoned on these notes, and written new ones, and want you to sign them." The defendant replied, "I will pay you all I owe you within a year;" and afterwards, being sued upon these notes, said: "She need not have sued me. The last time I saw her I promised to pay her every cent I owed her within a year." It was held that the evidence was properly submitted to the jury for them to say whether this promise included the note barred by the statute. But *quære*, could the promise be said to be sufficient to embrace that note? If the statute had run thereon, could the defendant be said to owe it? The court held that it was a question of fact for the jury to say whether the defendant intended to include this note with the others, and in that view the ruling may be sustained.

¹ Whitney v. Bigelow, *ante*.

² Whitney v. Bigelow, *ante*; Cook v. Martin, *ante*; Frost v. Benough, *ante*.

³ Cook v. Martin, *ante*; Frost v. Benough, *ante*; Whitney v. Bigelow, *ante*. It is not necessary that the amount or nature of the debt should be stated. If the particular indebtedness is sufficiently identified, these circumstances may be supplied by extrinsic evidence. Lechmere v. Fletcher, 1 C. & M. 623. In Lord v. Harvey, 3 Conn. 370, the court adopted this view. In Lawrence v. Worrell, Peake's Cas. 93, LORD KENYON held that an acknowledgment that some money is due is sufficient to take the case out of the statute as to all that is due. See also Peters v. Brown, 4 Esp. 46; Lloyd v. Maund, 2 T. R. 760; Catling v. Skoulding, 6 id. 193.

⁴ Frost v. Benough, *ante*. See also in Whitney v. Bigelow, *ante*.

⁵ Cook v. Martin, *ante*.

⁶ Stout v. Marshall, 75 Iowa, 498.

certain "old notes," saying, "I have no money now, but you shall have every cent that is due on them," was held insufficient to remove the bar of the statute, as it did not specify the particular notes referred to in the letter. It may be stated as a general rule that, where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is upon the defendant to show that it related to another debt, or to a balance upon the debt in suit and another debt.¹ But if, upon its face or upon the proof, it is clearly established that the acknowledgment did not relate to the debt in suit, the court should direct a nonsuit, where a nonsuit can be directed by the court, or should direct a verdict for the defendant, where a nonsuit cannot be directed without the leave of the parties. Thus, in an English case² in assumpsit on a bill of exchange, to which the statute of limitations was pleaded, two letters were given in evidence to take the case out of the statute. They were written by the defendant to a third person; the first of them stated that he should be much obliged to the plaintiff to withdraw his outlawry, and added that, as soon as his situation would allow, the plaintiff's claim, with others, should receive that attention which, as an honorable man, he considered them to deserve. The second letter expressed his readiness to do anything to satisfy the plaintiff and all his creditors. No evidence was given of any proceeding to outlawry having been taken with respect to the debt the plaintiff sought to recover. It was held that, under these circumstances, the letters were not sufficiently connected with that debt to entitle the plaintiff to a verdict, and he was nonsuited; but leave was given for a motion to set aside the nonsuit. On application afterwards to the Court of Common Pleas the nonsuit was confirmed, a rule *nisi* for setting it aside being refused.

It was insisted that, upon the authority of an earlier case,³ as the letters did not refer to any particular debt, it would apply to whatever claim the plaintiff set up. "In that case," said TINDAL, C. J., "the acknowledgment was of a general nature, not applying to any particular claim. Here my difficulty is, that in the first letter a claim is spoken of, as to which Mr. Fearn had proceeded to outlawry. It is you who are to take the case out of the statute, and I think you should show the fact of the outlawry. If I could look at this record and see that there was any appearance of a proceeding to outlawry, I should know how to deal with it; but I cannot see that this can apply. I think you must show a little more specifically and pointedly that this acknowledgment applies to the particular debt. The new statute says, that 'no acknowledgment or promise by word only shall be deemed sufficient evidence of a new or continuing contract,' &c., 'unless such acknowledgment or promise shall be made or contained by or in some

¹ Whitney v. Bigelow, *ante*; Cook v. Martin, *ante*.

² Fearn v. Lewis, 4 C. & P. 169.

³ Frost v. Benough, *ante*; Bird v. Gammon, 3 Bing. N. C. 888.

writing to be signed by the party chargeable thereby.' It becomes, therefore, the duty of the party who is to take a case out of the statute to show affirmatively that the acknowledgment applies distinctly to the debt. I do not think I ought to call upon the defendant in this case to show negatively that there is any other debt to which it can apply. This, after the best consideration I can give to the subject, is the conclusion at which I think I ought to arrive, and, therefore, I shall direct the plaintiff to be nonsuited."

Where an acknowledgment stands alone, in nowise dependent upon extrinsic circumstances, its effect and construction is for the court; but if it is explained, or in anywise controlled by extrinsic facts, the question is for the jury. Thus, in an English case,¹ the defendant sent the plaintiff a letter, as follows: "Sir, — Since the receipt of your letter (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. Morrell against me. I propose being in Oxford to-morrow morning, when I will call upon you on the matter." It was contended by the plaintiff that this letter was a sufficient acknowledgment in writing to take the case out of the statute, and he requested the court to leave the question to the jury; but the court, GURNEY, B., refused to do so, and held as a matter of law that the letter was not a sufficient acknowledgment, and upon hearing in Exchequer this ruling was sustained. "I think," said LORD ABINGER, C. B., "there is no ground for a rule. This letter contains nothing that can be construed into an acknowledgment of the debt. The most that can be made of it is that it is evasively worded, so as to avoid any direct acknowledgment. The next question is, whether it ought to have been left to the jury. One case in which the effect of a written document must be left to a jury is, where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts, in which peculiar terms and abbreviations are employed. So also, where a series of letters form part of the evidence in the cause, they must be left, with the rest of it, to the jury. But where the question arises on the construction of one document only, without reference to any extrinsic evidence to explain it, it is the safest course to adhere to the rule, that the construction of written documents is a question of law for the court. The intention of the parties is a question for the jury, and in some cases — in cases of libel, for instance — the meaning of the document is part of that intention, and, therefore, must be submitted to the jury. But where a legal right is to be determined from the construction of a written document which either is unambiguous, or of which the ambiguity arises only from the words themselves, that is a question to be decided by the judge. The decision in *Lloyd v. Maund* amounted to no more than this, that the judge was wrong in the inter-

¹ *Morrell v. Frith*, 3 M. & W. 402; *Clark v. Sigourney*, 17 Conn. 511; *Curzon v. Edmonds*, 6 M. & W. 295.

pretation he put upon the letter given in evidence, and therefore he should have left it to the jury. But the construction of written instruments is in the first place for the judge."

PAKKE, B., said: "I am of the same opinion. I think this letter contains no acknowledgment of a debt *simpliciter*, and no promise to pay. According to the recent cases, the document, in order to take the case out of the statute, must either contain a promise to pay the debt on request, or an acknowledgment from which such promise is to be inferred. Now, the utmost that can be made of this letter is, that it acknowledges the existence of the debt mentioned in the previous letters; but that the defendant does not mean to express any promise to pay, but reserves it for future consideration. There is certainly no denial of the debt, but it amounts to this only, — 'though I do not deny it, I do not promise to pay it; whether I will promise, and what species of payment I will make, I reserve for further consideration.' There is no acknowledgment *simpliciter*, but only coupled with this declaration of his intentions. But my brother Ludlow says the letter ought to have been left to the jury, on the authority of *Lloyd v. Maund*. I have always acted on that authority in the case of an obscure and doubtful document, but I have always disapproved it. The course I have taken is, to express my own opinion, and then to take that of the jury, in order that, if they differed with me, the opinion of the court might be fairly taken on the question whether the document should be left to the jury. But if I am called on to give an opinion, I think the case of *Lloyd v. Maund* is not law. The construction of a doubtful instrument itself is not for the jury, although the facts by which it may be explained are. It is not, however, necessary to decide that point, because my brother Ludlow does not ask for a new trial, unless we think this letter such as that a jury might fairly have inferred from it an acknowledgment of the debt." ¹

If there is an express promise to pay, all implied promises are excluded; and the party relying thereon must stand upon that exclusively, and cannot seek the aid of any implied promise to wrest his claim from the operation of the statute.² In the case first cited in the last note, it appeared that Isaac Mills in his lifetime executed to one Wildman a promissory note, as follows: —

NEW HAVEN, June 26, 1810.

On demand, for value received, I promise to pay to Zalman Wildman, or order, nine hundred and thirty-seven dollars, fifty cents, with interest till paid.

Witness my hand,

ISAAC MILLS.

¹ In *Hancock v. Bliss*, 7 Wend. (N. Y.) 267, it was held that, where the expressions are vague and indeterminate, leading to no definite conclusion, and at most only to probable inferences, which may affect different minds in different ways, as where the defendant said "that it was not in his power to pay at that time, but he hoped to see the plaintiff and do something about it," the evidence ought not to be left to the jury. See also *Magee v. Magee*, 10 Watts (Penn.), 172; *Berghaus v. Calhoun*, 6 id. 219; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Oliver v. Gray*, 1 H. & G. (Md.) 204.

² *Mills v. Wildman*, 18 Conn. 124; *Tanner v. Smart*, 6 B. & C. 603.

This instrument had an indorsement thereon as follows: "New Haven, May 14, 1824. Be it forever known and remembered that I owe the above note, and will pay it, and will never avail myself of any statute of limitations. Isaac Mills." And a later indorsement, as follows: "New York, Oct. 13, 1840. On a settlement of all accounts between me and the estate of Z. Wildman, Esq., whatsoever balance shall be due on this [note] shall be paid. Isaac Mills." Isaac Mills died in the early part of February, 1848, and the representatives of Wildman's estate presented the note to the commissioners of Mill's estate, and it was allowed at \$2,290.86. From this allowance the executors of Mills appealed, and the court, without passing upon the effect of the first indorsement, but evidently regarding it as insufficient, held that the last indorsement was sufficient to remove the statute bar; and that as the commissioners had passed upon the matter, and being the proper tribunal to ascertain the balance due, according to the terms of the last indorsement, their finding was conclusive. The appellant insisted that the promise contained in the last indorsement being express, the appellees could not avail themselves of any implied promise, and that the promise being conditional could have no force unless the condition was shown to have been complied with; and the court conceded both of these grounds, but held that a fair construction of the indorsement did not bind the appellees to a personal settlement with Mills in his lifetime, but to a legal settlement before any tribunal having authority to ascertain the balance due.

SEC. 69. *Express or Implied Refusal to pay.* — If an admission of a debt is accompanied with a distinct refusal to pay, the implication of a promise arising from the acknowledgment is of course rebutted.¹ Thus, even under the old theory (and *a fortiori* the case would be so still more now) an admission as follows, "I cannot afford to pay my new debts, much less my old ones," was held insufficient.² So, too, if an acknowledgment is accompanied with an objection to payment, which would, if valid, have been at any time a good defence to an action, no presumption of a promise of payment will be raised. Thus, an admission of a debt made to a person, who at the same time signed a paper importing to release it, was held not sufficient to avoid the statute, although the discharge was inoperative, and was indeed conditional upon an act of the defendant which he failed to perform.³ So, too, where the defendant said, "I acknowledge the receipt of the money, but the testatrix gave it to me," it was held that the last expression nullified the acknowledgment of the existence of the debt.⁴ So where

¹ Lee v. Wilmot, L. R. 1 Ex. 364; admission that the sum claimed has not
Brigstocke v. Smith, 1 C. & M. 488. been paid is not sufficient, without some

² Knott v. Farren, 4 D. & R. 179.

³ Goate v. Goate, 1 H. & N. 29.

⁴ Owen v. Wooley, Buller's N. P. 168; of a promise, express or implied, to pay the
De La Torre v. Barclay, 1 Starkie, 7. An debt, Allcock v. Ewan, 2 Hill (S. C.), 326;

the debtor said: "I know that I owe the money, but I will never pay it;"¹ or, "I owe the debt, but I will not pay it unless I am compelled to by law;"² or, "I owe the debt, but am too poor and cannot pay

Laurence v. Hopkins, 18 Johns. (N. Y.) 288; Sands v. Gelston, 15 id. 511; Moore v. Bank of Columbia, 6 Pet. (U. S.) 86; Mosher v. Hubbard, 18 Johns. 510; Guier v. Pierce, 2 Browne (Penn.), 85; Young v. Monpoey, 2 Bailey (S. C.), 278; Cohen v. Aubin, id. 283; Lowry v. Dubose, id. 425; Trammell v. Salmon, id. 308; and an admission that the debt continues due at the time of the acknowledgment, Bangs v. Hall, 2 Pick. (Mass.) 368; French v. Frazier, 7 J. J. Mar. (Ky.) 425; Wetzell v. Bussard, 11 Wheat. (U. S.) 310; Oliver v. Gray, 1 H. & G. (Md.) 204; Ferguson v. Taylor, 1 Hayw. 20; Belles v. Belles, 7 Halst. 339; Purdy v. Austin, 3 Wend. 187; Russell v. Gass, M. & Y. (Tenn.) 270; Barlow v. Bellamy, 7 Vt. 54; Mellick v. De Seelhorst, 1 Ill. 171. There must be such an acknowledgment as will satisfy a reasonable man that the defendant, at the time of making it, considered the debt then existing. Harwell v. M'Culloch, 2 Overt. (Tenn.) 275. The promise must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise, Kimmel v. Schwartz, 1 Ill. 216; Smallwood v. Smallwood, 2 D. & B. (N. C.) 330; Martin v. Waugh, id. 517; Oliver v. Gray, 1 H. & G. (Md.) 204; Eckert v. Wilson, 12 S. & R. (Penn.) 393; and must clearly refer to the very debt in dispute between the parties, Clarke v. Dutcher, 9 Cow. (N. Y.) 674. A general acknowledgment of indebtedness to the plaintiff is sufficient, *prima facie*, to take a demand out of the statute; the onus lies on the defendant to prove that he referred to a different demand. Whitney v. Bigelow, 4 Pick. (Mass.) 110. It must be distinct, and without a question of its being due, or an intimation that it would not be paid. Berghans v. Calhoun, 6 Watts (Penn.), 219; Gleim v. Ries, id. 44. There must be an express promise to pay, or an acknowledgment of a present indebtedness and willingness to pay. Allen v. Webster, 15 Wend. (N. Y.) 284; Stafford v. Richardson, id. 302; Gaylord v. Van Loan, id. 309. The new promise must be clear and express. Harrison v.

Handley, 1 Bibb (Ky.), 443; Ash v. Patton, 3 S. & R. (Penn.) 300; Head v. Manners, 5 J. J. Mar. (Ky.) 255; Bell v. Morrison, 1 Pet. (U. S.) 351. The mere claiming of a balance is not sufficient. Eckert v. Wilson, 12 S. & R. (Penn.) 393. A conditional promise is sufficient, but the plaintiff must show either a performance of the condition or a readiness to perform. Oliver v. Gray, 1 H. & G. (Md.) 204; Read v. Wilkinson, 2 Wash. (U. S. C. C.) 514; Bell v. Morrison, 1 Pet. (U. S.) 351. If the defendant promises to pay a debt barred by the statute, in certain specific articles, the promise is conditional, and the plaintiff is bound to show a willingness to accept such articles. Bush v. Barnard, 8 Johns. (N. Y.) 407. Where the maker of a note denied his signature, declaring the note to be a forgery, but said that, if it could be proved that he signed the note, he would pay it, and it was proved at the trial that he did sign it, this was held sufficient to take the case out of the statute of limitations. Seaward v. Lord, 1 Me. 163.

¹ A'Court v. Smart, 3 Bing. 392. Any suggestion accompanying an acknowledgment which qualifies it, or repels the idea of a promise to pay, destroys its effect. Cocks v. Weeks, 7 Hill (N. Y.), 45. In Danforth v. Culver, 11 Johns. (N. Y.) 146, the defendant admitted the indebtedness, but declared his intention to rely upon the statute; and it was held that the acknowledgment did not remove the statutory bar.

² Jenkins v. Boyle, 2 Cranch (U. S. C. C.), 120. In Warren v. Perry, 5 Bush (Ky.), 447, the question as to whether an intimation by a debtor that he would pay in cattle or horses, and his silence under the threat of a suit unless he would pay in United States currency, implied that he would not pay money in any form, and if sued would plead the statute of limitations, was held to be one for the jury. In Cowley v. Furnell, 15 Jur. 908, the defendant wrote to the plaintiff as follows: "I am much surprised at receiving a letter from H. B. [an attorney] for the recov-

it;"¹ or, "I owe the debt, but am under no obligation to pay it;"² and, generally, if there is anything attending what was said, which repels the inference of a promise to pay the debt, it does not save it from the operation of the statute.³

In Missouri, where the statutory provision relative to acknowledgments and promises to take the debt out of the statute is that "no acknowledgment, or promise hereafter made, shall be evidence of a new or continuing contract whereby to take any case out of the operations of the provisions of this article or deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable hereby." It is held that it is not necessary in order to take a claim out of the statute that the debtor should acknowledge a willingness to pay the debt, but that a simple acknowledgment that he owes it, and that it remains unpaid, is sufficient if the acknowledgment is not coupled with conditions or circumstances which repel or rebut an intention to pay it.⁴

In the case last cited, where the debtor by letter when speaking of the note in suit says of it, "The debt I owe you," it is an unequivocal admission and acknowledgment of an actual subsisting debt, and when he

ery of your debt. I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantehcon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed, when F. was in town;" and it was held not sufficient to remove the statute bar.

¹ Thayer v. Mills, 14 Me. 800.

² Lawrence v. Hopkins, 13 Johns. (N. Y.) 238; Gaylord v. Van Loan, 15 Wend. (N. Y.) 238. In Woodfin v. Anderson, 2 Tenn. Ch. 331, a writing as follows was held not sufficient to prevent the running of the statute: "I request that no suit shall be brought on this note, and agree that the statute shall not run against it. I will pay it soon."

³ Roosevelt v. Marks, 6 Johns. (N. Y.) 290; Clementson v. Williams, 8 Cranch (U. S.), 72; Bell v. Rowland, Hard. (Ky.) 801; Wetzell v. Bussard, 11 Wheat. (U. S.) 314; Thompson v. Peter, 12 id. 567; Ormsby v. Letcher, 3 Bibb (Ky.), 271; Harrison v. Hardy, 1 id. 448; Bell v. Morrison, 1 Pet. (U. S.) 351. A clear, distinct, and unqualified acknowledgment of a debt as an existing obligation, identifying it so that there can be no mistake as to what it

refers to, is sufficient, Johns v. Lantz, 63 Penn. St. 324; but it must be such that the debtor can be said to have recognized a present subsisting liability, and manifested a willingness to assume or renew the obligation, Simonton v. Clark, 65 N. C. 525; Chambers v. Ruby, 47 Mo. 99; Ringo v. Brooks, 26 Ark. 540. See Buffington v. Davis, 33 Md. 511, where a statement by a debtor that she regretted her inability to remit the amount of a note, and referring the holder to her agent who would do all that the ruined condition of her affairs would permit, was held sufficient. Where a debtor, upon being called upon to pay a debt, said, "If you will call in two weeks I will pay you something, I cannot tell how much," it was held to amount to an unqualified admission of his liability to pay the whole debt, and such an acknowledgment as removed the statute bar. Blake-man v. Fonda, 41 Conn. 581. So where a father for whom his daughter had worked admitted before his decease and within six years of the time the action was brought that he had made an express agreement to pay her a certain amount, it was held sufficient to keep the claim on foot. Watson v. Stein, 76 Penn. St. 121.

⁴ Chidsey v. Powell, 91 Mo. 622.

then expresses his inability to pay any part of the debt at that time, giving his reasons therefor, it was held that there was nothing in these expressions indicating a purpose not to pay or that is inconsistent with the implied promise to pay arising from the acknowledgment. BLACK, J., in delivering the opinion of the court said: "There is no question but the letter of Addis read in evidence related to the note in suit, so that the real question is: Does that letter contain such an acknowledgment as will avoid the plea of the statute of limitations? In view of the many conflicting decisions upon this subject, it is well to keep in view our statute, which, in substance, is that no acknowledgment or promise shall be evidence of a new or continuing contract whereby to take any case out of the operation of the statute, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable. It is to be observed, in the first place, it is not necessary to show an express promise; an acknowledgment will be sufficient. What, then, are the essential elements of the acknowledgment, to make it effectual?" In the case of *Elliott v. Leake*,¹ it was said: "It is not necessary that the party should acknowledge a willingness to pay the debt; it is sufficient that he acknowledges that he owed the debt, and that it remains unpaid. That evidence which will create an obligation will revive that obligation, if connected with evidence that the obligation has not been discharged." To the same effect is the case of *Boyd v. Hurlbut*.² But if the acknowledgment is accompanied with conditions or circumstances which repel or rebut an intention to pay, then it will not be sufficient to defeat the bar of the statute.³

From these adjudications it is clear that an acknowledgment of a debt, and that it remains unpaid, though there is no expression of willingness to remain bound, will avoid the bar of the statute of limitations, unless accompanied with conditions or circumstances which rebut or repel an intention to pay.

In the present case, the deceased, by the letter, when speaking of the note in suit, says of it, "that debt I owe you." There is here an unequivocal admission and acknowledgment of an actual subsisting debt. This is clear beyond all doubt. He then expresses his inability to pay it or any part thereof. We see nothing in the letter indicating a purpose not to pay, or that is inconsistent with the promise to pay, arising from the acknowledgment. The only thing left uncertain by the letter is as to when he could pay the note; but that uncertainty does not destroy the effect of the unequivocal acknowledgment of an existing debt.⁴

It will be observed, however, that the court recognizes the rule that a mere naked acknowledgment of a debt, when coupled with conditions or

¹ 5 Mo. 209.

² 41 Mo. 264.

³ *Boyd v. Hurlbut* and *Mastin v. Branham*, *supra*; *Chambers v. Rubey*, 47 Mo.

99. The presumption of a promise to pay, arising from the acknowledgment, is, from such circumstances, destroyed.

⁴ *Warlick v. Peterson*, 58 Mo. 408.

when coupled with anything which clearly indicates an intention not to pay it, does not operate to remove the statutory bar.

In a Michigan case,¹ the defendant in answer to the demand for the payment of an alleged indebtedness about to be barred by the statute of limitations, said that if she had certain papers she could offset certain accounts, and wanted time to get them. Being asked if she would extend the account for the period she desired, she signed this writing in the book containing the charge: "I extend this book account four months from April 30, 1886." The court held that this writing was equivalent to the acknowledgment that the debt was valid, and would become due in four months, and therefore that it was not barred by the statute.

In a Texas case,² a letter as follows:—

HAMILTON, 10th August, 1887.

DEAR FATHER,—I have done my best to raise some money, but I cannot do it now, because the little money which I had yet, I bought wheat for, which was cheap still. I bought it at 68 cents yet, and then hauled 40 miles; and corn for feed I must also buy, because that is very slim here, as rain was wanted. Cotton, too, don't look the best. But some money we will send you, but not all, because we must live first, and that in Brenham we must pay too; that was a hard lick for us. Dear father, you sent me a note that I don't sign. I will pay you some every year, but whenever I can; but I sign no more papers, for I think it is just as good without, because we all know how we stand; but you must be satisfied with what you get every year, for I will do whatever I can.

G. KRUEGER.

was held not sufficient to remove the bar of the statute. ACKER, P. J., delivering the opinion of the court, said: "Under proper assignment of error, it is contended that the court erred in holding that defendant's letter to plaintiff was sufficient to take the barred note out of the statute of limitations; and this is the only question we think it necessary to consider. It is conceded that the original debt was barred. When a debt is barred, the new promise relied on must acknowledge the justness of the claim, and express a willingness to pay it."³

"An acknowledgment which will take a debt out of the bar of the statute of limitations must be clear and unequivocal, and neither qualified by conditions nor limitations."⁴

"Considered in the light of these authorities, we think it too clear for

¹ Crane v. Abel, 11 West. Rep. (Mich.) 206.

² Kreuger v. Kreuger, 7 L. R. Ann.

³ Coles v. Kelsey, 2 Tex. 555.

⁴ McDonald v. Gray, 29 Tex. 88; Dickinson v. Lott, id. 173; Madox v. Humphries, 24 Tex. 196; Smith v. Fly, id. 353.

argument that the letter relied on by plaintiff to take the barred note out of the operation of the statute of limitations, is not sufficient for that purpose. It does not contain a clear, unequivocal, and unconditional acknowledgment of the justness of plaintiff's demand, nor does it contain an expression of a willingness to pay. We think it settled by the authorities, *supra*, that the acknowledgment to relieve the claim from the operation of the statute of limitations, must contain an unqualified admission of a just, subsisting indebtedness, and express a willingness to pay it. If the expression of a willingness to pay is coupled with conditions, it devolves upon the plaintiff to prove that the named conditions have taken place.¹

“We think the court below erred in its construction of the letter from defendant to plaintiff.”

SEC. 70. Essential Requisites of an Acknowledgment.—An acknowledgment of the original justice of the claim is not sufficient; it must go to the fact that it is due and unpaid,² and must not be attended with any acts or expressions that evince an intention not to pay it.³ It must be consistent with a promise to pay,⁴ unqualified,⁵

¹ Leigh v. Linthecum, 30 Tex. 103.

² Clementson v. Williams, 8 Cranch (U. S.), 72; Wetzell v. Bussard, 11 Wheat. (U. S.) 314; Thompson v. Peters, 12 id. 567; Boyd v. Grant, 13 S. & R. (Penn.) 124; Baxter v. Penniman, 8 Mass. 133; Jones v. Moore, 5 Binn. (Penn.) 576. A mere admission that a debt is due, and not paid, is not sufficient to remove the statute bar, when the admission is attended by expressions which repel the idea of an intention or desire to pay it. Gray v. McDowell, 6 Bush (Ky.), 475. A promise to pay all the notes that can be produced against him, but at the same time asserting that none can be produced, does not remove the statute bar. Norton v. Colby, 52 Ill. 198. The expression in a letter written by the defendant to the plaintiff, in relation to a debt due from the former to the latter, “I feel ashamed of it standing so long,” is not sufficient to take the debt out of the statute. Wilcox v. Williams, 5 Nev. 206. A debtor who allows an account against him to become stated, by omitting to dispute the same when presented, does not thereby waive the statute. Bucklin v. Chaplin, 1 Lans. (N. Y.) 447; Reynolds v. Collins, 3 Hill (N. Y.), 37. An indorsement on a note, made at about the time a note was executed, “If not paid I request indulgence,” is not such a

continued request as estops the debtor from pleading the statute. Carr v. Robinson, 8 Bush (Ky.), 269.

³ Senseman v. Hershman, 82 Penn. St. 83. Striking a balance, and the settlement of an account, is a clear admission of a sincere indebtedness. McClelland v. West, 70 Penn. St. 183; Johns v. Lantz, 63 id. 324.

⁴ Yaw v. Kerr, 47 Penn. St. 333; Airy v. Smith, 1 Phil. (Penn.) 337; Bailey v. Bailey, 14 S. & R. (Penn.) 195; Patton v. Hassenger, 69 Penn. St. 311; Watson v. Stern, 76 id. 121; Norton v. Carpenter, 2 W. N. C. (Penn.) 306; Guier v. Pearce, 2 Browne (Penn.), 35; Lyon v. Marclay, 1 Watts (Penn.), 271; Fries v. Baisselet, 9 S. & R. (Penn.) 128; Beasley v. Evans, 35 Miss. 192; Phelps v. Sleeper, 17 N. H. 332; Horner v. Starkey, 27 Ill. 13; Sennott v. Horner, 30 id. 429; Grayson v. Taylor, 14 Tex. 672; Hazlebacker v. Reeves, 9 Penn. St. 258; Webber v. Cochrane, 4 Tex. 31; Estate of Wetham, 6 Phil. (Penn.) 161; Laurence v. Hopkins, 13 Johns. (N. Y.) 288.

⁵ Boss v. Hershman, 33 Leg. Int. (Penn.) 306; Eckert v. Wilson, 12 S. & R. (Penn.) 393; Gilkyson v. Larue, 2 W. & S. (Penn.) 213; Crist v. Garner, 2 P. & W. (Penn.) 251; Allison v. Pennington, 7 W. & S. (Penn.) 180; Gleim v. Rise, 6

clear, plain, unambiguous,¹ and so distinct in its extent and form as to preclude hesitation as to the debtor's meaning,² and so as to enable the court to apply its terms as the debtor intended they should be applied.³ These rules are believed to be entirely consistent with the letter and spirit of these statutes, and essential to prevent the mischiefs which the statutes were intended to cure. The laxity of the rules formerly existing operated as a virtual repeal of the statutes by judicial legislation, rather than a fair application of the rules of construction; and in this branch of the law the courts have exhibited more inconsistency and more proneness to go wrong, to carry out their notions of justice, than in any other since courts have existed. The rules stated do not preclude the raising of a promise from the recognition of a debt, where there is nothing said or done by the debtor inconsistent with an intention to pay it,⁴ but are calculated to effectuate the intention of the statutes, by giving the debtor the benefit of their protection, except in those cases where he has fairly deprived himself thereof, by having said or done that which the law can fairly regard as the foundation for an implied promise to pay the debt. Formerly, if even in a casual conversation with a stranger to the debt the debtor spoke of a claim barred by the statute, as an existing debt against him, although at the same time he declared his intention not to pay it,⁵ the naked admission of the debt was deemed sufficient, although the circumstances were such as to clearly show that he intended to avail himself of the benefit of the statute;⁶ and even though it was made after action brought, and after

Watts (Penn.), 44; Ayres v. Richards, 12 Ill. 146; Stockett v. Sasscer, 8 Md. 374; Wakeman v. Sherman, 9 N. Y. 88; Lowry v. Dubiose, 2 Bailey (S. C.), 425; Smallwood v. Smallwood, 2 D. & B. (N. C.) L. 386; Mastin v. Waugh, id. 517; Loomis v. Decker, 1 Daly (N. Y. C. P.), 186; Hancock v. Bliss, 7 Wend. (N. Y.) 267; Cocks v. Weeks, 7 Hill (N. Y.), 45; Bradley v. Field, 3 Wend. (N. Y.) 272; Allen v. Webster, 15 id. 284; Bloodgood v. Bruen, 8 N. Y. 362; Bangs v. Hall, 2 Pick. (Mass.) 368; Mumford v. Freeman, 8 Met. (Mass.) 432; Bailey v. Crane, 21 Pick. (Mass.) 323.

¹ Senseman v. Hershman, 82 Penn. St. 83; Allison v. James, 8 Watts (Penn.), 380; Farley v. Kustenhader, 3 Penn. St. 418; Webster v. Newbold, 41 id. 482; Emerson v. Miller, 27 id. 278.

² Berghaus v. Calhoun, 6 Watts (Penn.), 219; Miller v. Baschore, 83 Penn. St. 356; Magee v. Magee, 10 id.

172; Wolfinsberger v. Young, 47 id. 516; Harbold v. Kuntz, 16 id. 210.

³ Suter v. Sheeler, 22 Penn. St. 308; Shitler v. Bremer, 23 id. 413.

⁴ Watson v. Stern, 76 Penn. St. 121; Patton v. Hassenger, 69 id. 311.

⁵ Cobham v. Moseley, 2 Hayw. (N. C.) 6; Dean v. Pitts, 10 Johns. (N. Y.) 35; Mosher v. Hubbard, 13 id. 510.

⁶ Austin v. Bostwick, 9 Conn. 496; Keplinger v. Griffith, 2 G. & J. (Md.) 296; Mitchell v. Mitchell, 11 G. & J. (Md.) 388; Carroll v. Ridgway, 8 Md. 328; Murray v. Coster, 20 Johns. (N. Y.) 576; Sheppard v. Murdock, 3 Murph. (N. C.) 218; Cadmus v. Dumon, 1 N. J. L. 176. In Richard v. Hannay, 4 East, 604, the defendant, in an affidavit to the court for leave to file a plea of the statute, stated that, "since the bill of exchange on which the action was founded became due, no demand for payment had been made on him," and it was held such an acknowledgment of the debt as removed the statute bar.

he had pleaded the statute thereto.¹ That the courts could ever have gone so far astray seems incredible, yet the reports are full of cases of the character referred to; but at the present time a more consistent doctrine prevails, and the old theories are universally discarded.

Where a person admits that the claim once existed, but also says that it has been paid in a particular mode, the plaintiff cannot, by proving that the claim has not been paid in that way, revive the debt.²

¹ *Stevens v. Hewitt*, 30 Vt. 262.

² *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Cowan v. Magauran*, 1 Wall. (U. S.) 66. In *Marshall v. Dalliber*, 5 Conn. 480, the defendant admitted that the note sued upon was originally just, but insisted that it had been paid by his wife's services. It was proved that the note had not been so paid. The court held that the admission did not remove the statute bar. "The principles of law," said BRISTOL, J., "applicable to this question have frequently been the subject of judicial construction, and are now settled in the courts of the United States, the State of New York, and our own State, in a manner more conformable to the intent of the legislature than many English cases. *Clementson v. Williamson*, 8 Cranch (U. S.), 72; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Lord v. Shalor*, 3 Conn. 131. These principles," he adds, "require that to do away the statute of limitations a defendant must voluntarily relinquish the protection it was intended to afford, either by an express promise to pay the debt, or by acknowledging that it is due, from which the law raises a promise to pay, and which is tantamount to an express promise."

"If such are the settled principles to which our decision must acquiesce, the only remaining inquiry must be, whether the defendant, by his acknowledgment, did admit the continued existence of the original debt, or promise to pay it. This he might do, either in express terms, or by strong implication from other language which he might use."

"It has not been contended that the language used by the defendant contained a promise to pay the debt, or an acknowledgment of its justice, either express or implied. On the contrary, the defendant denied his liability, and declared the debt was satisfied, by the services of his wife, while she lived in the family of the testator."

"Now, whatever doubt may have existed in the decided cases, whether the acknowledgments relied on did or did not amount to an admission of the debt, or a promise to pay it, still, such admission or promise, either by the defendant himself, or some other person referred to by him, has been generally held as absolutely necessary to take a case out of the statute; and the adjudged cases here generally turned upon the true import of the evidence relied on, rather than on any serious doubts respecting the law. But in the present case there is no doubt relative to the import of the defendant's admissions; nor can any inference be made against the defendant, unless his declarations relative to the mode of payment are suffered to be disproved, and what was in fact a denial of the debt on his part thus converted into an absolute acknowledgment of the debt and a promise to pay it."

"It is said, however, that if the plaintiff can disprove the mode of payment alleged by the defendant, this will raise a presumption that the debt is still due, and be equivalent to a direct acknowledgment of the debt by the defendant; and this principle receives considerable countenance from the case of *Hellings v. Shaw*, 7 Taunt. 608. In delivering his opinion in that case, CHIEF JUSTICE GIBBS observes: 'That where a defendant states, not that a debt remained due, but that it is discharged by particular means, to which he has, with precision, referred himself, and where he has designated the time and mode so strictly that the court can say it is impossible it had been discharged in any other mode, there the court have said, if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground upon which he professed to rely.'

"But if the authority of this case were unquestionable, I should think it admitted

Where a general indebtedness exists, a part of which is barred by the statute and a part not, a general acknowledgment will not remove the

of much doubt whether the mode of payment alleged by the defendant was disproved or falsified by the testimony of the plaintiff. The evidence of the plaintiff did not disprove the services of the defendant's wife, or show that those services had been satisfied by the testator in some other way. The services might have been rendered to the testator, and not charged on book, and the defendant might have had a fair claim on the testator for the value of such services, which he recognized; and he might have agreed that such services should satisfy the note, although it was dated after such services were rendered. To conclude that the defendant's language meant nothing but a strict and technical payment would be absurd. The first answer to this authority, therefore, is, that the special mode of payment alleged by the defendant was not disproved by the plaintiff's evidence; and, of course, there is no implied admission of the debt.

"This court, however, are not bound by this precedent; nor can they properly follow it, unless satisfied of its being reasonable and just. We have looked through the English decisions for the adjudged cases, from which the position of CHIEF JUSTICE GIBBS is derived; but we have looked in vain. In the subsequent case of *Beale v. Nind*, 4 B. & Ald. 568, the Court of King's Bench appear dissatisfied with the positions taken by the Chief Justice of the Common Pleas. CHIEF JUSTICE ABBOTT said: 'He was by no means satisfied that it was competent for the plaintiff to falsify what the defendant said as to the demand being paid;' and BAYLEY, one of the most learned and accurate judges then on the court, says: 'I am certainly not aware of the cases to which my LORD CHIEF JUSTICE GIBBS refers, to support that proposition.' In another report of the same case, decided by the Common Pleas, it is said CHIEF JUSTICE GIBBS 'confined his observation to the case of a defendant claiming his discharge under a written instrument, to which he, with precision, refers.' The weight of English authorities, therefore, is not much in favor of al-

lowing a plaintiff to disprove the special mode of payment alleged by the defendant, and we are satisfied that, whether countenanced by these authorities or not, it is opposed to principle; and we feel disinclined to make further inroad upon a statute of great public utility, especially when judges are constantly lamenting that too many exceptions have been made already. A debt being barred by the statute of limitations, the defendant is entitled to take advantage of it, unless he consents to relinquish its protection either expressly or by evident implication. The truth or falsehood of the defendant's statement as to paying the demand appears to me immaterial to the true point of inquiry, which, in all such cases, should be, whether the defendant has, by an express or implied recognition of the debt, voluntarily renounced the protection of the statute. We think this should depend on the defendant himself, and on his own declarations, and not on the disproving the truth of these declarations, and thereby converting what was intended as an absolute denial of any indebtedness into an acknowledgment of such debt and a promise to pay it. It might as well be claimed if the defendant denied the execution of a note barred by the statute of limitations, and the plaintiff could prove that he executed it, that the defendant had forfeited the protection of the statute. No intention to waive the protection of the statute can be inferred from the declarations of payment made by the defendant, even if those declarations are proved untrue." *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; *Moore v. Columbia Bank*, 6 Pet. (U. S.) 86; *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308; *Fillet v. Linsey*, 6 J. J. Mar. (Ky.) 337; *Purdy v. Austin*, 3 Wend. (N. Y.) 187; *Cambridge v. Hobart*, 10 Pick. (Mass.) 232; *Clark v. Dutcher*, 9 Cow. (N. Y.) 674; *Tichenor v. Colfax*, 4 N. J. L. 153; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Russell v. Copp*, 5 id. 154; *Gold v. Whitcomb*, 14 Pick. (Mass.) 188; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *Brackett v. Mountfort*, 12 Me. 72; *Frey v. Kirk*, 4 G. & J. (Md.) 509.

bar, because it may have been intended simply to apply to the indebtedness within the statute.¹

SEC. 71. Bare Acknowledgment. — A naked acknowledgment of a debt as due and unpaid, not coupled with any condition or words indicating an intention not to pay, is held in some of the States sufficient to remove the statutory bar.² But in all cases, except where

¹ *Morgan v. Walton*, 4 Penn. St. 32; *Suter v. Sheeler*, 22 id. 308. In *Wessner v. Stein*, 97 Penn. St. 322, a question as to the quality of an acknowledgment sufficient to take a case out of the statute was ably considered and discussed by MERCUR, J. "It is settled," said he, "that the acknowledgment or admission must be a clear and unambiguous recognition of an existing debt, and so distinct and expressive as to preclude hesitation as to the debtor's meaning, and as to the particular to which it applies, and must be consistent with a promise to pay." In *McClelland v. West*, 59 Penn. St. 487, it was held that the words, "I agree to settle this bill," were not sufficient to remove the statute bar, as they only amounted to a promise "to examine and adjust it," and did not warrant the implication of a promise to pay. When a debtor, on being presented with a bill, said, "I will attend to it," it was held not to amount to an acknowledgment of, or promise to pay, the debt. *Marqueze v. Bloom*, 22 La. An. 328. But in *Bliss v. Allard*, 49 Vt. 350, a letter in which the debtor spoke of a "settlement," and expressed a willingness "to leave it out to be settled," but thought they had better settle it themselves, was held sufficient. In *Wessner v. Stein*, 97 Penn. St. 322, the court, by MERCUR, J., say, "The debt is not destroyed by the statute of limitations, but the right of action or remedy is gone. When that is restored, the declaration is still on the original contract, and not on the acknowledgment as a new promise; such acknowledgment is but a waiver of the statutory defence." *Suter v. Sheeler*, 22 Penn. St. 310. Where a debtor gives to his creditor the note of a third person, payable at a future day, as collateral security for a debt upon which the statute has begun to run, it operates as an acknowledgment of the whole debt, the same as a part payment in money would, but it only operates to sus-

pend the statute and start it anew, from the time of the delivery of such note; and a payment upon such note by the person against whom the note so given as collateral security exists does not operate as a payment by the debtor himself, or have the effect to renew the principal debt. *Smith v. Ryan*, 66 N. Y. 352. The original debt must first be established, then a clear, distinct, and unequivocal acknowledgment made within six years is sufficient to remove the statute bar. MERCUR, J., in *Wessner v. Stein*, 97 Penn. St. 326; *Watson v. Stein*, 76 id. 121; *Palmer v. Gillespie*, 9 W. N. C. (Penn.) 535. In Louisiana, it is held that parol evidence is admissible to prove an acknowledgment of a debt before the statute has run thereon. *Bernstein v. Hicks*, 21 La. An. 179; *Harrell v. White*, 21 id. 195; and while the debtor is alive. But it is held to be inadmissible to prove an acknowledgment of a party deceased for the purpose of establishing liability against his estate. *Succession of Hillebrandt*, 21 La. An. 350. So, too, it is held inadmissible to establish a renunciation or waiver of the defence of the statute after the debt is barred. *Offut v. Chapman*, 21 La. An. 293. In Iowa, by sec. 1670 of the code, an admission that a debt is due and unpaid is given the same effect to take it out of the operation of the statute as a new promise.

² *Black v. Reyhold*, 8 Harr. (Del.) 528; *Lee v. Polk*, 4 McCord (S. C.), 215; *Lord v. Shaler*, 3 Conn. 131; *Elder v. Dyer*, 26 Kan. 604; *Bissell v. Jordan*, 16 Ohio St. 508. As that "it is just and unpaid." *Beasley v. Evans*, 35 Miss. 192. "The debt is a just and honorable debt, and I do not consider it outlawed." *Estate of Wetham*, 6 Phil. (Penn.) 161. "It is a debt which I shall have to pay, and intend to pay." *Hall v. Creswell*, 12 G. & J. (Md.) 36. A bare acknowledgment of a debt made before the statute has run,

the statute otherwise provides, it is held that the acknowledgment must be such that a promise to pay the debt can fairly be implied

Rodrigue v. Fronty, 2 Brev. (S. C.) 31; *Hazlebacker v. Reeves*, 9 Penn. St. 258, admitting that a note is genuine, though at the same time he refused to pay it, has been held sufficient, *Cobham v. Mosley*, 2 Hayw. (N. C.) 6; *Cobham v. Administrators*, 2 id. 6; but this cannot be regarded as accurate, because it expressly rebuts any promise. But an acknowledgment that certain notes against him exist in the plaintiff's favor, but that he has an account to go against them, with a promise to call in a certain time and have the notes and accounts settled, is sufficient. *Chapin v. Warden*, 15 Vt. 560. So a statement that he is willing to settle the claim if established, but accompanied with a denial that it can be established, has been held sufficient, if the claim is established. *Paddock v. Colby*, 18 Vt. 485. The general rule is that an acknowledgment, to take a debt out of the statute, must be an unqualified acknowledgment of a previous subsisting indebtedness which the party is willing to pay, *Weaver v. Weaver*, 54 Penn. St. 152; *Jackson v. People*, 40 Ill. 405; *Conover v. Conover*, 1 N. J. Eq. 403; *Turner v. Martin*, 4 Robt. (N. Y.) 661; *Allen v. Webster*, 15 Wend. (N. Y.) 284; *Waples v. Layton*, 3 Harr. (Del.) 508; *Stafford v. Richardson*, 15 Wend. (N. Y.) 302; *Horlbeck v. Hunt*, 1 McMull. (S. C.) 197; *Sherman v. Wakeman*, 11 Barb. (N. Y.) 254, 9 N. Y. 85; and that the debt continues due at the time of the acknowledgment, *Mellick v. De Seelhorst*, 1 Ill. 171; *Bangs v. Hull*, 2 Pick. (Mass.) 368; *Barlow v. Bellamy*, 7 Vt. 54; *French v. Frazier*, 7 J. J. Mar. (Ky.) 425; *Russell v. Goss, M. & Y.* (Tenn.) 270; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 310; *Belles v. Belles*, 12 N. J. L. 339; *Purdy v. Austin*, 3 Wend. (N. Y.) 187. But the doctrine of *Paddock v. Colby*, *ante*, is sustainable, upon the ground that what was said by the debtor was not a mere acknowledgment, but an express promise to pay the debt, if any existed; in other words, an express, conditional promise to pay, and the condition is satisfied, and the promise made absolute when the debt is established. An admission that a note sued on was made by

the defendant, but that he supposed it was paid by a joint maker, which he could prove, has been held sufficient. *Deau v. Pitts*, 10 Johns. (N. Y.) 35; *Mosher v. Hubbard*, 13 id. 510. But see *Bell v. Rowland, Hard.* (Ky.) 301, where an acknowledgment by the defendant was that he once owed the debt, but he supposed his brother paid it, and if his brother had not paid it, he owed it yet, was held insufficient to remove the statute bar. See also *Gardner v. Tudor*, 8 Pick. (Mass.) 206. In *Brackett v. Mountfort*, 12 Me. 72, an acknowledgment that the "debt was once due, but that he had paid it years before by having an account against him," was held not sufficient, although the defendant filed no account in offset, and offered no proof that he ever had an account against the plaintiff. In *Penn v. Crawford*, 16 La. An. 255, the defendant stated that "he thought the note had been settled, but if not, he would arrange it." Upon a later occasion he said "he would see the plaintiff and settle the amount of the note;" and it was held that this evidence was too doubtful, if uncorroborated, to interrupt the statute. In a Maryland case, *Frey v. Kirk*, 4 G. & J. (Md.) 509, the maker of a note, when shown it, and asked if it was his, replied "yes;" but when asked what arrangement he could make of it, replied, "As to that I cannot say;" and upon being told that if it was not settled it would be sued, said, "You may save yourself the trouble, as I have taken the benefit of the insolvent law;" it was held that this could not be construed into an existing indebtedness, so as to remove the statutory bar. See also *Danforth v. Culver*, 11 Johns. (N. Y.) 146, where the defendant admitted the execution of the note by him, but said that it was outlawed, and he intended to avail himself of the statute; and it was held not a sufficient acknowledgment to take the case out of the statute. See also *Smith v. Freel, Add.* (Penn.) 291, where an admission of the genuineness of a note, accompanied with a statement that he had paid it, was held not sufficient. A letter which acknowledges a subsisting indebtedness is sufficient to take the case out of the stat-

therefrom, or it is inoperative. That is, it must be made in such a manner and under such circumstances as to indicate a willingness and intention to pay it.¹ Thus, where a debtor, upon being presented with a claim, said, "I will attend to it," it was held not such an acknowledgment as would remove the statute bar.² "It does not," say the court, "import an acknowledgment of the plaintiff's right. The statement that a debtor will attend to a demand does not prove that the creditor has a right to demand payment, or that the bill is correct, and the debtor bound to pay it; at most it merely implies that the debtor will inquire into its correctness, and his liability to pay it." Nor, where a debtor under proceedings in insolvency inserts in a schedule of his debts, filed and sworn to by him, a claim which is barred by the statute, can it be said that he thereby acknowledges the debt under such circumstances as will support an implied promise to pay the debt.³ Such an acknowledgment may be said to be compulsory, as the debtor is compelled by law to embrace it in his schedule, or take the chances of having the debt urged against him thereafter. Such an acknowledgment, under the present state of the law, can have no more effect to renew the debt than a compulsory payment would have.⁴ But embracing such

ute, as it is in writing and signed by the party to be charged. *Chace v. Higgins*, 1 T. & C. (N. Y.) 220. But a letter in effect acknowledging the existence of an indebtedness, and proposing a compromise, but distinctly avowing a determination not to pay if the compromise is rejected, will not remove the statute bar, *Creuse v. Defiganiere*, 10 Bosw. (N. Y.) 122; nor is an admission of the original indebtedness in an answer under oath, denying the defendant's liability to pay it, *Com. Mut. Ins. Co. v. Brett*, 44 Barb. (N. Y.) 489. See also *Bloodgood v. Bruen*, 8 N. Y. 362, where such an admission in an answer, filed to a bill in equity by a third person, was held not sufficient. In *Clementson v. Williams*, 8 Cranch (U. S.), 74; MARSHALL, C. J., said, "It has frequently been decided that an acknowledgment of a debt barred by the statute of limitations takes the case out of the statute and revives the original cause of action. It is not sufficient to take the case out of the statute that the claim should be proved or be acknowledged to have been originally just: it must go to the fact that it is still due." *Andrews v. Brown*, 1 Eq. Ca. Ab. 305, 12 Owen's Abr. 192; *Yea v. Fouraker*, 2 Burr. 192; *Trueman v. Fenton*, 2 Cowp. 548; *Lloyd v. Maund*, 2 T. R. 760; *Rucker v. Harmony*, 4 East, 604, n.; *Lawrence v. Worrall*, Peake's Cas.

93; *Jackson v. Fairbanks*, 1 H. Bl. 340; *Bailey v. Lord Ichiquin*, 1 Esp. 435; *Clark v. Bradshaw*, 3 id. 155; *Peters v. Brown*, 4 id. 46; *Bryan v. Horseman*, 4 East, 599, *Gainsford v. Grammar*, 2 Camp. 9; *Sluby v. Champlin*, 4 Johns. (N. Y.) 464; *Baxter v. Penniman*, 8 Mass. 133; *Leaper v. Tatton*, 16 East, 418; *Dean v. Pitts*, 10 Johns. (N. Y.) 35. "The principle which governs in the construction of these statutes is, that the presumption arises that the defendant, from the lapse of time, has lost the evidence which would have availed him in his defence, if seasonably called upon for payment. But when this presumption is rebutted by an acknowledgment of the defendant within six years, the contract is not within the intent of the statute." PARSONS, C. J., in *Baxter v. Penniman*, *ante*; *Lord v. Shaler*, 3 Conn. 131; *Thompson v. Osborn*, 2 Stark. 98.

¹ *Georgia Ins. Co. v. Elliott*, Taney (U. S.), 130.

² *Marqueze v. Bloom*, 22 La. An. 328.

³ *Georgia Ins. Co. v. Elliott*, *ante*; *Richardson v. Thomas*, 13 Gray (Mass.), 381; *Roscoe v. Hale*, 7 id. 274; *Hidden v. Cozzens*, 2 R. I. 401; *Christy v. Flemington*, 10 Penn. St. 129; *Stoddard v. Doane*, 7 Gray (Mass.), 387; *Brown v. Bridges*, 2 Miles (Penn.) 424.

⁴ *New York Belting, &c. Co. v. Jones*,

a debt in a schedule of his debts, made at the time of the making of his will, being a voluntary act, and evincing an expectation and willingness that it be paid, has been held sufficient,¹ although even this doctrine is doubtful; and in Massachusetts,² where, after the testator's death, a mortgage-deed duly executed, but not delivered, was found among the debtor's papers, to secure the payment of a demand barred by the statute, it was held not a sufficient acknowledgment of the indebtedness to take the debt out of the statute; and this would not seem to be inconsistent with the doctrine of the Tennessee case, because in that case nothing more remained to be done to give validity to the will; while in the Massachusetts case delivery was essential to give validity to the mortgage, and never having been delivered, it was inoperative. In a recent case in Missouri³ it was held that a demand is not taken out of the operation of the statute of limitations by a written acknowledgment found among the debtor's papers after his death. The court said: "There is a conflict of the authorities as to whether an acknowledgment or promise in writing, signed by the party to be bound,

22 La. An. 530. If a debtor orally promises that if the creditor will wait he shall be paid from a provision to be made for him in the debtor's will, and if, afterwards, the debtor makes a will containing a general bequest for the creditor, and subsequently revokes this will, nothing has been done which affects or suspends the running of the statute. *Petrie v. Mott*, 38 Hun (N. Y.), 259. Under a foreclosure of a mortgage more than twenty years old, the fact that the defendant took a deed for part of the premises, within twenty years, and accepted the title subject to the mortgage, is a sufficient acknowledgment to take the case out of the statute. *Moore v. Clark*, 40 N. J. Eq. 152.

The N. J. statute declares that twenty years' possession of mortgaged land by the mortgagee, after default, shall forever bar the right of redemption. After such possession had continued for twenty-nine years the mortgagee attempted, in pursuance of his contract of sale, to procure a strict foreclosure. It was held not an admission of the right to redeem, which constituted a waiver of the bar. *Chapin v. Wright*, 41 N. J. Eq. 438.

A claim against a deceased debtor was duly proved in, and passed by the orphan's court. With leave of court the administrator retained money to pay it with other claims, and his account so showed. It was held, that, notwithstanding, when sued,

he could plead the statute. *Washington Market Co. v. Beckley*, 4 Mackey (D. C.), 163.

When the statute declares that only a written promise shall take a debt out of operation of the statute, the doctrine of estoppel has no application to an oral promise. *Hill v. Perrin*, 21 S. C. 356.

A memorandum unsigned and undelivered is not "a written acknowledgment of an existing liability," removing the bar of the statute. *Abercrombie v. Butts*, 72 Ga. 74; 53 Am. Rep. 832. A joint suit against a firm is not saved from the bar of the statute by the individual acknowledgment of one member and his promise to pay. *Ford v. Clark*, 72 Ga. 760. An acknowledgment will be sufficient, although contained in an application made by a debtor to an insurance company for a policy on his life, when made at the request of the debtor and for his benefit; and the acknowledgment may be made before the debt is barred, to enable the surety again to become liable, there must be a new consideration. His promise, not based on a consideration, will not bind him. *Bridges v. Blake*, 106 Ind. 332.

¹ *Rogers v. Sothern*, 4 Baxter (Tenn.), 67.

² *Merriam v. Leonard*, 6 Cush. (Mass.) 151.

³ *Allen v. Collier*, 70 Mo. 138.

if made to a stranger, would be sufficient to take a case from under the operation of the statute of limitations; but there is no conflict as to the necessity for such a promise of acknowledgment being made to some person, either to the creditor or his representative, or to a stranger. A promise or acknowledgment implies that it is made to somebody, and in every promise there must necessarily be a promisor and promisee. A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered to the creditor or any one else, cannot have the effect of preventing the operation of the statute."

SEC. 72. Promise to Settle.—A mere promise "to settle" a demand has been held not sufficient to support a promise to pay it.¹ But in South Carolina a promise "to settle" has been held equivalent to a promise to pay;² and a similar rule of construction has been adopted in North Carolina.³ But in Vermont, in one case, virtually the same rule has been adopted as in Virginia;⁴ and such also is the rule in Pennsylvania,⁵ although in some of the earlier cases in that State a different rule prevailed.⁶ Such a promise is treated merely as a promise to examine the claims and adjust the balance.⁷ But we apprehend that the effect to be given to such words must depend largely upon the circumstances of each case, in view of all that was said upon the occasion, and the circumstances under which they are used,⁸ as

¹ *Bell v. Crawford*, 8 Gratt. (Va.) 110; *Succession of Jewell*, 11 La. An. 83. Where the items of an account are read to a party, and he admits the correctness of each item, and of the whole account, but as to certain items states that he thought the whole or a part of them had been paid by his son, and that he thought the account was correct, and that he would see his creditor, and settle with him; such admissions do not show a new promise so as to take the case out of the statute of limitations. *Ayres v. Richards*, 12 Ill. 146.

² *Johnson v. Bonnethean*, 3 Hill (S. C.), 15.

³ *McLin v. McNamara*, 2 D. & B. (N. C.) Eq. 82.

⁴ *Brayton v. Rockwell*, 41 Vt. 621. See also *Currier v. Lockwood*, 40 Conn. 349. But in Vermont, as elsewhere, the rule is that the question as to whether a promise to settle a demand amounts to a promise to pay it, will depend upon all the circumstances attending the use of the expression. Thus, in *Bowman v. Downer*, 28 Vt. 532, where a note was given with the agreement that a certain account should be settled and applied thereon, it was held a sufficient

promise to take the debt out of the statute. In another case, *Hunter v. Kittredge*, 41 Vt. 359, an unqualified promise to settle book-accounts barred by the statute was held to amount to a direct admission of unsettled accounts existing between them at the time; and that such promise to settle accounts, when unaccompanied with any unwillingness to pay whatever balance might be due, is sufficient to raise a promise to pay.

⁵ *Weaver v. Weaver*, 54 Penn. St. 152.

⁶ *Jones v. Moore*, 5 Binn. (Penn.) 573; *Wells v. Pyle*, 1 Phila. (Penn.) 21; *Patton v. Ash*, 7 S. & R. (Penn.) 116; *Miles v. Moodie*, 3 id. 211.

⁷ *McClelland v. West*, 59 Penn. St. 487.

⁸ See opinion of SEYMOUR, C. J., in *Currier v. Lockwood*, *ante*. In *Bliss v. Allard*, 49 Vt. 350, a letter in which the debtor spoke of "settlement," and expressed his wish to leave the claim out "to be settled," but thought "they had better settle it themselves," was held an unequivocal acknowledgment of an unsettled account, and sufficient to take the claim out of the statute, there being no disavowal of willingness to pay.

an acknowledgment of a debt to be operative need not be entirely by words, but may arise both from what was said and done.¹ In a Louisiana case,² the claim sued upon was presented to the debtor upon two occasions. Upon the first he said he "thought the note had been settled, but if not, he would arrange it;" on the second occasion he said, "he would see the plaintiff and settle the amount of the note;" and the court held that this, of itself, standing alone, was not sufficient to interrupt prescription.³

In a case in the United States Supreme Court,⁴ the court says: "The principles of law by which this case is to be governed are clearly settled by a series of decisions of this court. The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose. The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But in order to continue or to revive the cause of action, after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay that debt, or else an express acknowledgment of the debt, from which his promise to pay it may be inferred. A mere acknowledgment, although in writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor."⁵

¹ *Whitney v. Bigelow* and *Currier v. Lockwood*, *ante*. See *post*, chapter on PART PAYMENT.

² *Penn v. Crawford*, 16 La. An. 255.

³ In *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291, the defendant wrote to the plaintiff: "I will thank you to let me have your account that you hold against me; also I will thank you to state the credit you have given me. You may depend at seeing me at your office on Monday next. I will endeavor to settle all my accounts with you. Perhaps I shall not be able to pay the money, if not, we can find some way to settle;" and it was held sufficient. In this case there is enough to found a promise to pay upon, independent of the promise to settle.

⁴ *Shepherd v. Thompson*, 122 U. S. 231.

⁵ In *Shepherd v. Thompson*, *ante*, the court reviewed the case as follows:

In *King v. Riddle*, 7 Cranch, 168, a deed, dating July 15, 1804, by which the defendant recited that certain persons had

become his sureties for a certain debt, and had paid it, and that he was desirous to secure them as far as he could, and assigned to one of them certain bonds in trust to collect the money and distribute it equally among them, was admitted in evidence in an action by one of them against him for money paid, to take the case out of the statute of limitations of Virginia. The exact form of the deed is not stated in the report, but that it expressly recognized the debt to the plaintiff to be still due is evident from the opinion, in which CHIEF JUSTICE MARSHALL said: "Although the court is not willing to extend the effect of casual or accidental expressions farther than it has been, to take a case out of that statute, and although the court might be of opinion that the cases on that point have gone too far, yet this is not a casual or incautious expression; the deed admits the debt to be due on the 15th of July, 1804, and five years had not afterwards elapsed before the suit was brought."

In *Clementson v. Williams*, 8 Cranch,

SEC. 73. Failure to deny Liability. Expressions of Regret, &c. —
The fact that a debtor, upon being called upon for payment, does not

72, in an action on an account against two partners, one of whom only was served with process, a previous statement of the other, upon the account being presented to him, "that the said account was due, and that he supposed it had been paid by the defendant, but had not paid it himself, and did not know of its ever being paid," was held insufficient to take the account out of the statute; and CHIEF JUSTICE MARSHALL said: "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away. In this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not then sufficient to take the case out of the act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due."

CHIEF JUSTICE MARSHALL afterwards pointed out that in that case, although the partnership had been dissolved before the statement was made, the case was not determined upon that point, but upon the insufficiency of the acknowledgment; and added that, upon the principles there expressed by the court, "an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or, if it be conditional, it may amount to a new assumpsit for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." *Wetzell v. Bussard*, 11 Wheat. 309.

In *Bell v. Morrison*, 1 Pet. 351, Mr.

JUSTICE STORY fully discussed the subject, and, after dwelling on the importance of giving the statute of limitations such support as to make it "what it was intended to be, emphatically, a statute of repose," and "not designed merely to raise a presumption of payment of a just debt, from lapse of time;" and repeating the passages, above quoted, from the opinions in *Clementson v. Williams* and *Wetzell v. Bussard*, said: "We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expression be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action."

Again, in *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86, the court, speaking by MR. JUSTICE THOMPSON, after referring to the previous cases, re-affirmed the same doctrine, and said: "The principle clearly to be deduced from these cases is that in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed." In *Randon v. Toby*, 11 How. 498, the agreement, which was held to take a case out of the statute, contained not only a pledge of property to secure the notes sued on, but an express stipulation

deny the validity of the claim cannot be regarded as such an acknowledgment thereof as will raise a promise to pay it. Thus where, upon

that the notes should remain in as full force and effect as if they were renewed. In *Walsh v. Mayer*, 111 U. S. 31, in answer to a letter from the holder of a note secured by mortgage, calling attention to the want of insurance on the mortgaged property, and saying: "The amount you owe me on the \$7,500 note is too large to be left in such an unprotected condition, and I cannot consent to it," the mortgagors wrote to him that they expected to insure in about four months for twice that amount, and added: "We think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down." This was held to be a sufficient acknowledgment, upon the ground that the words, both of the plaintiff's letter and of the defendant's reply, were in the present tense, and designated a subsisting personal liability, and that the unconditional acknowledgment of that liability, without making any pledge of property or other provision for its payment, carried an implication of a personal promise to pay it. The case was decided upon its own facts, and no intention to modify the principles established by the previous decisions was expressed or entertained by the court. Within a year afterwards, in the latest case on the subject, the court expressly re-affirmed those principles. *Fort Scott v. Hickman*, 112 U. S. 150. In full accord with these views are the decisions in England under Stat. 9 Geo. IV. chap. 14, known as Lord Tenterden's Act, which only restricts the mode of proof by requiring that, in order to continue or revive the debt, an "acknowledgment or promise shall be made by or contained in some writing, to be signed by the party chargeable thereby." The English judges have repeatedly approved the statement of MR. (afterwards CHIEF JUSTICE) JERVIS, that the writing must either contain an express promise to pay the debt, or be "in terms from which an unqualified promise to pay it is necessarily to be implied." *Everett v. Robertson*, 1 El. & El. 16, 19; *Mitchell's Claim*, L. R. 6 Ch. 822, 828; *Morgan v. Rowlands*, L. R. 7 Q. B. 493, 497; citing Jervis' *New Rules*, 4th edition, 350, note.

And it has been often held that when the debtor, in the same writing by which he acknowledges the debt, without expressly promising to pay it, agrees that certain property shall be applied to its payment, there can be no implication of a personal promise to pay. *Routledge v. Ramsay*, 8 Ad. & El. 221; s. c. 3 Nev. & P. 319; *Howcutt v. Bonser*, 3 Exch. 491; *Cawley v. Furnell*, 12 C. B. 291; *Everett v. Robertson*, above cited. The law upon this subject has been well summed up by VICE-CHANCELLOR WIGRAM, as follows: "The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt; and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." *Philips v. Philips*, 3 Hare, 281, 299, 300; *Buckmaster v. Russell*, 10 C. B. N. s. 745, 750.

In the most recent English case that has come under our notice, LORD JUSTICE BOWEN said: "Now, first of all, the acknowledgment must be clear, in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear, within the meaning of the definition," "because the words express the lesser in such a way as to exclude the greater." *Green v. Humphreys*, 26 Ch. D. 474; s. c. 53 L. J. N. s. Ch. 625, 628. In the light of the principles established by the au-

being called upon for payment, the defendant did not object thereto, but said "he thought he had paid it, and had the receipt at home," it was held not sufficient, even though it was shown that he had not paid the debt, and had no receipt therefor.¹ Where a debtor, among other things,

thorities above referred to, it is quite clear that the instrument signed by the defendant on June 21, 1877, did not take the plaintiff's debt out of the statute.

The instrument referred to is as follows: "In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10, 1878, and recorded in Liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepard and others against the United States for the use and occupation of the premises No. 915 E. Street Northwest, and all the proceeds thereof, the moneys derived therefrom, are hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid; and it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay. Witness our hands this 21st day of June, 1877."

This instrument contains no promise of the defendant personally to pay that debt, and no acknowledgment or mention of it as an existing liability. It begins with a reference, by way of consideration only, to the original debt, designating it as "the indebtedness described in the deed of trust" executed to the plaintiff at the time when the debt was contracted. Then follows a pledge of a certain claim of the defendant against the government, and its proceeds to secure the payment "said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid." This interest is mentioned, not as part of the consideration, or of the original debt, or as anything for which the defendant is liable, but only as something to the

payment of which the claims pledged shall be applied. And the instrument concludes with a promise of the defendant that the proceeds of the claim pledged shall "be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay."

Although the old debt is expressly called, as it is in law, the consideration for the new agreement, and not the old debt is the measure of the plaintiff's right. The provisions for the payment of the debt and interest out of a particular fund exclude any implication of a personal promise to pay either. The whole instrument clearly evinces the defendant's intention in executing it to have been that the property pledged should be applied, so far as it would go, to the payment of the debt and interest, and not that his own personal liability should be increased or prolonged in any respect.

To imply from the terms of this instrument a promise of the defendant to pay the debt himself would be, in our opinion, to construe it against its manifest intent, and to fritter away the statute of limitations.

¹ *Conwell v. Buchanan*, 7 Blackf. (Ind.) 537. See also *Brackett v. Mountfort*, 12 Me. 72. In *Gardner v. Tudor*, 8 Pick. (Mass.) 206, in an action on a note the defendant said "he supposed the note was paid by the land mortgaged; that he was willing to do what was right; that he would make some small additional payment to settle the business; but that, if the plaintiff thought proper to sue without taking the land, he should resist the suit;" and it was held not such an acknowledgment as would warrant the inference of a promise to pay the note. In *Cambridge v. Hobart*, 10 Pick. (Mass.) 232, the defendant, on being called upon to pay a note against him, barred by the statute, admitted that he signed the note, and said he did not know that it had been paid, but presumed it was due; but the court held

in a letter said, "I feel ashamed of it standing so long," this being the strongest expression used in the letter, the court held that it could not

that this was not enough to take the note out of the statute. See also *Parsons v. Northern, &c. Iron Co.*, 38 Ill. 430; *Bangs v. Hull*, 2 Pick. (Mass.) 368; *Marshall v. Dalliber*, 5 Conn. 480. In *Sanford v. Clark*, 29 Conn. 457, the defendant presented an offset to the plaintiff's demand, and the plaintiff pleaded the statute thereto; and the defendant, for the purpose of repelling the statute, proved that on the trial of the cause in the court below the plaintiff, for the purpose of dispensing with the necessity of sending for a witness to prove that he admitted the debt to be due on the 20th of December, 1852, expressly admitted that he owed the defendant the debt claimed; that the same was a just debt, and had never been paid, and was still unpaid for anything he knew; but that he supposed it had been handed to his assignee, he having several years before made an assignment in insolvency. He also testified, on cross-examination, "I say now that the defendant's account was a just one, and I do not claim I have ever paid it. It is now due, for anything I know." The court held that this did not remove the statute bar. "It is true," said SANFORD, J., "that ordinarily an acknowledgment that a debt claimed was once due, and that it has never been paid, fairly implies a new promise made at the time of such acknowledgment to pay such debt. But if at the time of making such acknowledgment the party insists upon the protection of the statute, and thus in effect declares that he will not pay the debt, notwithstanding its justice, no such implication arises and no promise can be found. In such a case the issue is, whether the party promised to pay the debt or not. That he did may be inferred and found from his mere acknowledgment of the existence and justice of the debt, because of the presumption that every man is willing to pay his honest debts. But no such inference or presumption can arise in the face of the debtor's declaration accompanying his acknowledgment, that notwithstanding the justice of the debt he will not pay it." There are a class of cases where an admission by the debtor in his

testimony in the case, or pleadings, or affidavits filed therein, that the debt is due and unpaid, have been held sufficient to remove the statute bar. In *Rucker v. Hannay*, 4 East, 604, in an affidavit for leave to plead the statute filed by the defendant, a statement that "since the bill of exchange (on which the action was brought) became due no demand for payment had been made on him," was held a sufficient acknowledgment to be left to the jury to find a promise from. There are also a class of cases in which it has been held that an admission of a debt in an answer to a bill in equity is sufficient. *Brigham v. Hutchins*, 27 Vt. 569. But, whatever may formerly have been the rule, such a doctrine is inconsistent with the present theory and policy of the law in this regard, and cannot be sustained. The jury, in order to find a promise to pay, must find that by what the debtor said and did he intended to pay the debt, and if the admission is contained in an affidavit, plea, or answer, for a particular purpose, without an intention of charging himself with liability for the debt, no promise can be found therefrom. *Deyo v. Jones*, 19 Wend. (N. Y.) 491. An admission by a defendant that the debt was once due, but at the same time claiming that it has been paid in a certain way, — as by his wife's services, — is not sufficient to take the debt out of the statute, even though it is proved that the debt has not been paid in the manner stated. *Marshall v. Dalliber*, 5 Conn. 480; *Carroll v. Ridgway*, 8 Md. 328; *Mitchell v. Sellman*, 5 id. 376; *Brackett v. Mountfort*, 12 Me. 72. Where the defendant said that he was not holden to pay anything, that the contract could never be enforced in law, and that he would never pay anything, as it was an unjust debt, it was held that a promise could not be inferred from such declarations. *Laurence v. Hopkins*, 13 Johns. (N. Y.) 288. So where A., who had a claim for slave hire against B., which was barred by the statute, said to B. that the matter of the slave's hire must be fixed up, and B. assented, and asked if no other notes than his own would do, and A. an-

be regarded as a sufficient foundation for an implied promise.¹ Mere expressions of regret at not having paid a debt barred by the statute

answered, "Yes, if they are good," it was held that B.'s question did not take the claim out of the operation of the statute, by a fair construction of the language, and that B. was entitled to such a construction. *Taylor v. Stedman*, 11 Ired. (N. C.) L. 447. So where a defendant, on being arrested, said he owed the plaintiff money, and he intended to pay it, but would keep it as long as he could, on account of the plaintiff's ungentlemanly conduct, it was held not sufficient to take the case out of the statute of limitations. *Fries v. Boisselet*, 9 S. & R. (Pa.) 128; *Hudson v. Carey*, 11 id. 10. The plaintiff, holding a note against the defendant, caused a suit to be commenced upon it, about a year and a half after its date. The defendant told the sheriff who came to serve the writ, that if he would not arrest him then, he would go to work at his trade, and would pay the debt as fast as he could. Upon a plea of the statute of limitations, it was held that the defendant's language was too uncertain and indefinite to constitute a conditional promise to pay when he should be able, but that the promise to pay was absolute. *Butterfield v. Jacobs*, 15 N. H. 140. In another case the maker of a note, on being called upon for payment, said that he had not the money, but would pay the note as soon as he could; and it was held that these words were too uncertain and indefinite to constitute a conditional promise to pay when he should be able, but that the promise to pay was absolute. *First Congregational Soc. in Lyme v. Miller*, 15 N. H. 520. In a later case, a request being made to a defendant to pay a note, as he had agreed to do, he answered, that folks did not always do as they agreed. Held, that this was not evidence of a new promise sufficient to take the note out of the operation of the statute of limitations. *Douglas v. Elkins*, 28 N. H. 26. An account being read to the defendant, he said that he "supposed it was right, and was willing to settle and give his note; but he thought the plaintiff

had not given him all the credit to which he was entitled." Held, that these expressions did not amount to a new promise, *Mills v. Taber*, 5 Jones (N. C.) L. 412; and the same was also held where a defendant, in an affidavit for a continuance, stated "that the action was founded on his guaranty, and by the absent witness he expected to prove such laches on the part of the plaintiff as to discharge him from his engagement," *Bank of Newbern v. Sneed*, 3 Hawks (N. C.), 500; and also where a debtor admitted a debt, but said "that it was not in his power to pay it at that time; but he hoped to see the plaintiff, and to do something about it," *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; and also where the proof was, that the defendant said the demand ought to have been paid before, and that he would pay it as soon as he conveniently could, *Cocks v. Weeks*, 7 Hill (N. Y.), 45. Where, upon the transfer of a note, an indorsed credit was overlooked, so that the indorsee paid the full amount called for in the face of the paper, and afterwards, on being applied to and the mistake pointed out, the indorser said he was willing to do what an honest man ought to do, and paid back the amount of the credit thus overlooked, — held, that this was no promise, express or implied, to pay, nor was it a distinct acknowledgment of a subsisting debt, so as to repel the statute of limitations. *Gilmer v. McMurray*, 7 Jones (N. C.) L. 479. In a North Carolina case, where the plaintiff, to rebut the plea of the statute, proved that the defendant's testator in his last sickness sent for him, and was anxious to settle an account between them, and, not succeeding, made entries of credits to which he was entitled, but made no admission of a balance due the plaintiff, it was held that the evidence should be left to the jury, with instructions to find for the defendant, unless they thought that the testator wished the account to be settled after his death. *Ballenger v. Barnes*, 3 Dev. (N. C.) L. 460. A gave B. an order on C. for \$70,

¹ *Wilcox v. Williams*, 5 Nev. 206.

cannot be said to amount to a waiver of the protection of the statute. The debtor must go farther, and say that which evinces at least a willingness to pay it. So where a debtor intimates a willingness to pay a debt in specific property, but the creditor declines to accept it, such offer does not amount to a sufficient acknowledgment of the debt to take it out of the statute;¹ and the same is true as to an offer to pay a less sum than is due, in full satisfaction of the debt, and in such a case the statute bar is not removed even to the extent of the sum offered;² although where the maker of a note which is barred by the statute

the amount of a medical bill; B. presented the order to C., who said "he thought the bill was high; that he had not the money to pay it at that time, but would see A. himself and settle." In a suit by A. against C. to recover the amount of his bill, it was held that this was not sufficient to take the case out of the statute of Mississippi, which provides that "no promise shall revive any cause of action unless the same be in writing and signed by the party to be charged thereby, or unless it be proved that the very claim sued on was presented, and acknowledged to be due and unpaid." *Thornton v. Crisp*, 22 Miss. 52. A debtor expressed to a witness a desire to pay certain bills when he should be able; but the witness did not remember that he then had the bills with him. Held, that this was not sufficient to take the claims out of the statute, if previously barred. *Adams v. Torrey*, 26 Miss. 499. A debtor, to whom application for payment was made, said it was impossible for him to pay, but offered to mortgage certain real estate to pay the debt, and to pay the interest every ninety days, which offer the creditor did not accept. Held, that this did not take the case out of the statute of limitations. *Exeter Bank v. Sullivan*, 6 N. H. 124. Upon the presentment of a note to one of the two makers of it, he said that it was as he expected, and that the amount of an indorsement upon it, which had been made by the other maker within six years, was correct. Upon being asked how he expected to get clear of paying it, he said that he supposed there must be a formal demand before the suit could be maintained. Held, that this did not take the case out of the statute. *Kelley v. Sanborn*, 9 N. H. 46. And generally it is now the invariable rule that no acknowledgment is sufficient

to remove the bar of the statute, unless it is of such a character that the law will imply a new promise therefrom. *Moore v. Stevens*, 33 Vt. 308; *Jordan v. Hubbard*, 26 Ala. 433; *Brailsford v. James*, 3 Strobb. (S. C.) 171; *Smith v. Talbot*, 11 Ark. 666; *Cooke v. Ash*, Riley (S. C.), 246; *Beck v. Beck*, 25 Penn. St. 278; *Kensington Bank v. Patton*, 14 id. 479; *Patton v. Magrath*, 1 McMull. (S. C.) 212; *Bates v. Bates*, 33 Ala. 102; *Ten Eyck v. Wing*, 1 Mich. 40; *Steele v. Jennings*, 1 McMull. (S. C.) 297; *Tazewell v. Whittle*, 13 Gratt. (Va.) 329; *Pray v. Garcelon*, 17 Me. 145; *Miller v. Lancaster*, 14 id. 300; *Marseilles v. Kenton*, 17 Penn. St. 238; *Walker v. Walton*, 18 Ga. 119; *Loftin v. Aldridge*, 3 Jones (N. C.) L. 328; *McDowell v. Goldsmith*, 24 Md. 214; *Sherrod v. Bennett*, 8 Ired. (N. C.) L. 309; *Wolfe v. Fleming*, 1 id. 290; *Phelps v. Stewart*, 12 Vt. 256; *Bailey v. Crane*, 21 Pick. (Mass.) 323; *Westbrook v. Beverley*, 19 Miss. 419; *Fortune v. Hays*, 15 Rich. (S. C.) Eq. 112; *Lombard v. Pease*, 14 Me. 349; *Wolfensberger v. Young*, 27 Penn. St. 278; *McBride v. Gay*, Busb. (N. C.) L. 420; *Richardson v. Thomas*, 13 Gray (Mass.), 381; *Crowder v. Nichol*, 9 Yerg. (Tenn.) 453; *Harman v. Claiborne*, 1 La. An. 342; *Miffin v. Stalker*, 4 Kan. 283. And it must be made by a person competent to contract, or it has no validity, as the law will not imply a promise from an acknowledgment, however strong may be its terms, where the party making would not be bound by an express promise. *Hannum's Appeal*, 9 Penn. St. 471.

¹ *Warren v. Perry*, 5 Bush (Ky.), 447.

² *Morris v. Hazelhurst*, 30 Md. 362; *Phelps v. Stewart*, 12 Vt. 256. See *Bowker v. Harris*, 30 id. 424; *Cross v. Conner*, 14 id. 394.

offers to pay the principal, but refuses to pay the interest, it has been held that the statute bar is removed as to the principal, but not as to the interest;¹ and, under the rule now adopted as to conditional acknowledgments, it is questionable whether the statute is removed as to any part of the debt, unless the creditor signifies his acceptance of the offer, when made.²

SEC. 74. Effect of Acknowledgment. — An acknowledgment or new promise only operates to keep the debt on foot for six years from the time when the acknowledgment or promise was made. After the lapse of that period it has no effect against the statute.³

SEC. 75. Offer to pay in Specific Property. — A question may arise as to the effect of a promise to pay a debt barred by the statute in specific articles, as, "If you will take your pay in wheat, I will pay you," or, "If you will take your pay in work, I will pay you," &c. Now, upon the theory upon which the law relating to acknowledgments and promises rests, the creditor can require no more than the debtor agrees to do; and there can be no question but that, in order to save his debt from the operation of the statute, he takes the burden of showing that he not only accepted the offer, but also that he was ready to accept the pay in the mode named by the debtor. To this extent the courts in New York have gone;⁴ but it seems to us that, if no time is fixed upon within which such payment is to be made, the creditor must go farther, and show that he called upon the debtor for the specific property, or to perform the labor, and that he refused to do so, unreasonably, before he can enforce his claim against him for the amount of his claim in money. Such would seem to be the legitimate effect of the new promise. A part payment in property made upon a debt barred by the statute operates as an acknowledgment of the entire debt, in the absence of any restrictive words. Thus, in an English case,⁵ the defendant was sued for the price of hay sold to the wife

¹ *Graham v. Keys*, 29 Penn. St. 189; *McDonald v. Gray*, 29 Tex. 80; *Collyer v. Willcock*, 4 Bing. 315.

² In *Allcock v. Ewan*, 2 Hill (S. C.) 326, the rule was accurately stated thus: "If an offer is made differing from the terms of the original contract, it must be accepted by the other party in order to revive the original debt." An admission as to part of a debt has been held good as to such part. *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Gray v. Lawridge*, 2 Bibb (Ky.), 284. But where a debtor, to whom application for payment was made, said it was impossible for him to pay, but offered to mortgage certain real estate to pay the debt, and to pay the interest every ninety days, which offer the creditor did not

accept, it was held that this did not take the case out of the statute. *Exeter Bank v. Sullivan*, 6 N. H. 124. So where the maker of a note authorized an agent to offer thirty dollars for the note, and the offer was not accepted, it was held not to amount to a promise sufficient to take the case out of the statute of limitations; and the fact that the maker said that he owed the debt, but was not then able to pay it, but that he was determined to pay it, was held not to be evidence of an unconditional promise to pay. *Atwood v. Coburn*, 4 N. H. 315.

³ *Munson v. Rice*, 18 Vt. 53.

⁴ *Bush v. Barnard*, 8 Johns. (N. Y.) 407.

⁵ *Hooper v. Stevens*, 4 Ad. & El. 71.

before marriage, and he set up the statute of limitations. On the trial before LORD DENMAN, C. J., the plaintiff, to take the case out of the statute, proved that, after the delivery of the hay, and within six years of the commencement of this action, the wife, who was then single, and kept a public-house, said to the plaintiff, "Mr. Hooper, you must make use of some spirit, I know; why not have it of me? As long as I owe you money for hay, if it is ever so little, it will be a way to lessen the debt." The plaintiff said he would take a gallon of gin at 12s., and a jar filled with gin was sent to him. It was contended that this delivery of goods by the wife was equivalent to a part payment, and barred the statute. On the other hand, it was urged that the delivery could not operate as a payment, inasmuch as the defendants, if now suing for the price of the spirits, could only declare as for goods, and not for a liquidated sum of money. The court held, upon the authority of a previous case in the same court,¹ that the delivery of the goods, under these circumstances, operated to remove the statute bar as to the residue of the debt, as it was clearly an acknowledgment of the debt from which a promise to pay the balance thereof could be implied.

SEC. 76. **Promise not to plead the Statute.**—While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet, if made before the debt is barred, and in consideration of forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires,² either by way of estoppel,³ or as a conditional promise to pay the debt in case the plaintiff proves it.⁴ But after a debt is actually barred by the statute, a mere naked promise not to plead the statute has no validity, as it is a mere *nudum pactum*. In order to be operative it must be predicated on a new consideration.⁵ An admission as

¹ Hart v. Nash, 2 C. M. & K. 337.

² Paddock v. Colby, 18 Vt. 485; Smith v. Leper, 10 Ired. (N. C.) 86; Cooper v. Parker, 25 Vt. 502; Randon v. Toby, 11 How. (U. S.) 493; Brown v. State Bank, 5 Ark. 134.

³ Smith's Leading Cases, Am. note, 318; Allen v. Webster, 15 Wend. (N. Y.) 289; Utica Ins. Co. v. Bloodgood, 4 id. 652. In Gardner v. M'Mahon, 3 Q. B. 561, referred to in the text, LORD DENMAN said: "When the debtor says before the six years have passed, which seems to me an important circumstance, 'I will waive the statute,' it may well be supposed that the creditor on his part has forbore to sue, relying upon this undertaking as preserv-

ing his right of action, if it should be wanted." PATTERSON, J., said: "The defendant admits something to be due, though he does not agree with the plaintiff as to the amount; but he says, 'I will not avail myself of the statute, and will put it out of my power to do so.' That, if taken alone, makes a promise. The expressions which follow do not qualify that promise."

⁴ Burton v. Stevens, 24 Vt. 131.

⁵ Stockett v. Sasser, 8 Md. 374; Steele v. Jennings, 1 McMull. (S. C.) 297; Brown v. Edes, 37 Me. 318. In Warren v. Walker, 23 Me. 453, the defendant in writing agreed to "waive all defence which a party might otherwise make under the statute of limitations," and it was held

follows, "I do not wish to avail myself of the statute of limitations," was held insufficient.¹ Usually, perhaps, where there is a promise not to plead the statute, there will be found in the context something further which will amount to an acknowledgment of indebtedness from which a promise to pay may be implied; but in the absence of such context it seems on the authority of the cases cited, and upon a strict application of the present theory as to the principles of the doctrine of acknowledgment, that a promise not to take advantage of the statute will have no efficacy in itself as an acknowledgment of a debt. Such a promise, however, where it is supported by a consideration, and is not a mere *nudum pactum*, may amount to an agreement, for the breach of which damages may be recovered.² And it must be borne in mind that if the promise not to take advantage of the statute be made within six years, and while the debt is still recoverable, the forbearance to sue will be itself a sufficient consideration. It may, however, be argued that any such promise must be disregarded as frustrating the policy of the statutes, and as being contrary to the rule that prescription cannot be renounced in advance.

It might, indeed, at first sight seem that a promise not to take advantage of the statute amounted practically to a promise to pay the debt in question; and it seems to have been so considered in an English case,³ where the promise was, "As you have mentioned the limitations act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note for whatever amount is due you. To pay you now, or within the year, I am utterly unable." It is obvious, however, that a promise not to plead the statute in an action is not inconsistent with an intention to defend the action upon its merits; and a promise in the following terms, "I hereby debar myself of all future plea of the statute," was held not sufficient.⁴

SEC. 77. Conditional Acknowledgment. — If a debtor annexes any qualification or condition to his acknowledgment or promise, it will not be operative to remove the statutory bar without proof of its performance;⁵ and a contrary rule would nullify the principle upon which the

not sufficient to prevent him from setting up the statute; and a similar doctrine was held in the case of *Brown v. Edes*, *ante*.

¹ *Rackham v. Marriott*, 2 H. & N. 196.

² *East India Co. v. Paul*, 7 M. P. C. C. 85. In this case it is distinctly laid down by LORD CAMPBELL that there might be an agreement that, in consideration of an inquiry into the merits of a disputed claim, no advantage should be taken of the statute of limitations in respect of time employed in the inquiry, and that an action might be brought for breach of such agreement.

Gardner v. M'Mahon, 3 Q. B. 561.

⁴ *Waters v. Earl of Thanet*, 2 Q. B. 757.

⁵ In the case of *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309, MARSHALL, C. J., in delivering the opinion of the court, said: "We think, upon the principles expressed by the court in the case of *Clementson v. Williams*, 8 Cranch (U. S. C. C.), 72, that an acknowledgment which will revive the original cause of action must be unqualified and unconditional, it must show positively that the debt is due in whole or in part. If it be connected with circumstances which in

doctrine relating to acknowledgments rests. It is not the acknowledgment of itself which revives the debt, but the promise which the law

any manner affect the claim, or if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown. In the case at bar, the defendant said to one witness that if the plaintiff had come forward and settled certain claims the defendant had against him, he would have given him his powder; and to another he said, 'he should be ready to deliver the powder whenever the plaintiff settled a suit which Doctor Ewell had brought against defendant in the court of Alexandria, on account of a patent-right and machine sold to him by the plaintiff.' These declarations do not amount to an unqualified and unconditional acknowledgment that the original debt was justly demandable. They assert a counter-claim on the part of the defendant, which he was determined to oppose to that of the plaintiff. He did not mean to give validity to the plaintiff's claim, but on condition that his own should be satisfied. These declarations, therefore, cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. It may be considered as a new promise, for which the old debt is a sufficient consideration, and the plaintiff ought to prove a performance, or a readiness to perform, the condition on which the promise was made." *Bell v. Morrison*, 1 Pet. (U. S.) 251, where the case of *Wetzell v. Bussard* is cited, and the doctrine there settled, declared by STORY, J., in delivering the opinion of the court, to be "the only exposition of the statute which is consistent with its true object and import." In *Seaward v. Lord*, 1 Me. 163, where the maker of a promissory note denied his signature, declaring the note to be a forgery, but said that if it could be proved that he signed the note he would pay it, and it was proved at the trial that he did sign it, it was held sufficient to take the case out of the statute of limitations. So in *Stanton v. Stanton*, 1 N. H. 425, the defendant was sued upon

a note of hand, and pleaded the statute of limitations. It was proved that he made the note, and that the same had been presented to him within six years, when he said, "that he did not recollect giving the note; but if he did, he would pay it, its being outlawed should make no odds;" this was held sufficient to take the case out of the statute. In *Tanner v. Smart*, 6 B. & C. 603, in assumpsit brought to recover a sum of money, the defendant pleaded the statute of limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant within six years: "I cannot pay the debt at present, but I will pay it as soon as I can." It was held that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. In *Scales v. Jacobs*, 3 Bing. 638, to a plea of the statute of limitations the plaintiff replied a promise within six years, and proved that three years after the original cause of action accrued, and within six years of the commencement of the action, the defendant, being called on for payment of the plaintiff's demand, said, "it was not in his power to pay, but as soon as it was he would." Held, that the plaintiff must also prove the defendant's ability to pay. In *Ayton v. Bolts*, 4 Bing. 105, in an action on an attorney's bill to which the defendant pleaded the statute of limitations, the plaintiff proved that the defendant, having been applied to for payment within six years before the commencement of the suit, said, "he should be happy to pay the debt if he could," and added, that if the plaintiff could recover for him a debt due to him from one Gurney, the plaintiff might therewith satisfy his own debt. Held, that the plaintiff must show the defendant's ability to pay. But in the case of *Thompson v. Osborne*, 2 Stark. 98, it was held by LORD ELLENBOROUGH, at *nisi prius* (in 1817), that a promise by a defendant to pay a debt by instalments when he is able, is sufficient to take the case out of the statute of limitations, without proof of time being given, or of the ability of the party. Upon the general

raises from the acknowledgment; and if that is conditional, it follows, as a matter of course, that the debt can only be revived subject to such conditions. The debtor, after the statute has run, is master of the situation. If the creditor expects to recover any portion of the debt, he must take it upon such terms as the debtor sees fit to dictate. PARKE, B., in an English case,¹ gave expression to the rule as follows: "An unconditional acknowledgment," said he, "is good to prove a promise, because you would infer from it that the party meant to pay on request. But if he annexes any qualification or condition, that is not a sufficient acknowledgment, without proof of the performance of it."² Thus,

question, and to the effect that the condition must be performed in order to give vitality to the acknowledgment or promise, see *Pearson v. Harper*, 11 La. An. 184; *Bates v. Bates*, 33 Ala. 102; *Shaw v. Newell*, 1 R. I. 488; *Farmers' Bank v. Clarke*, 4 Leigh (Va.), 603; *Mullett v. Shrumph*, 27 Ill. 107; *Mitchell v. Clay*, 8 Tex. 443. In *Sweet v. Franklin*, 7 R. I. 355, in a suit by an administrator against a son of the deceased on a note that had been given by him to his father, but upon which the statute had run, evidence was admitted showing that he had promised to pay the note if a settlement of his father's estate should be made upon his mother without administration, in order to save expenses. The condition was not performed, and the court held that the acknowledgment was inoperative. In *Luna v. Edmiston*, 5 Sneed (Tenn.), 151, the defendant told the plaintiff, to whom he owed a debt barred by the statute, "If you will buy C.'s land, I will pay him what I owe you, which will be enough to pay the first instalment." It was held not sufficient, unless the condition was complied with and the land purchased.

¹ *Hart v. Prendergast*, 14 M. & W. 741.

² In *Buckmaster v. Russell*, 10 C. B. N. S. 749, the defendant had written as follows: "I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of £40 9s. 6d. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851; but as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should

the proposal meet with your approbation we can make arrangements accordingly." This was held insufficient, WILLES, J., observing that it did not amount to a promise until the terms the defendant proposed were assented to. See also *Cowley v. Funnell*, 12 C. B. 291; *Fearn v. Lewis*, 6 Bing. 349. However, in *Collis v. Stack*, 1 H. & N. 605, an acknowledgment in the terms following was held good without any proof of assent: "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labor; this term will decide the matter." So where a defendant, called upon by a creditor, who held two promissory notes against him more than six years overdue, for a statement of his affairs, made out an account in which the notes were inserted as a debt to which he was liable, it was held to be a sufficient acknowledgment by the debtor. *Holmes v. Mackerell*, 3 C. B. N. S. 789.

If the acknowledgment of the debt is coupled with terms or conditions of any sort, no recovery can be had without proof of their fulfilment, *Cocks v. Weeks*, 7 Hill (N. Y.), 45; *The Farmers' Bank v. Clark*, 4 Leigh (Va.), 603; *Shaw v. Newell*, 1 R. I. 488; because as the debtor may admit the debt, and yet refuse to pay it, without giving any reason for his refusal, *Careth v. Paige*, 22 Vt. 179, he must necessarily be entitled to assume an intermediate position, and accord a portion of that which he might withhold altogether. Thus, an offer to pay a fixed sum in satisfaction of a larger one, or of an unliqui-

in a recent case,¹ an action was brought upon a note upon which the statute had run. The plaintiff claimed that the note was taken out of the operation of the statute by a promise in writing to pay the same, which was contained in a letter written to plaintiff by defendant in answer to a demand for payment. The alleged promise was as follows:—

“DEAR SIR, — I received a notice from you Saturday stating that a demand against me had been left in your office. I presume it is Mr. Ward's claim. I would say now, as I did before, and also told Mr. Ward, that when I was able I should most certainly settle the demand. I am not now, nor have I been, in a condition to settle it. It will be a great satisfaction to myself when I find my business will permit me to liquidate the demand, for being in debt with me is not at all agreeable, and to be free from such embarrassments is equally pleasant.”

The Superior Court ruled that defendant was liable upon the note; but this ruling was reversed upon exceptions, the court holding that, in order to make the acknowledgment operative as a promise to revive the debt, the defendant's ability to pay must be shown. The same doctrine has been held in numerous cases. Thus, where the debtor said, “As soon as I have the money I will remit;”² or, “As soon as the

dated account, will not remove the bar of the statute, even as it regards the sum actually offered, unless the offer be accepted when it is made, or within a reasonable time afterwards; because the acknowledgment which it implies cannot be separated from the condition with which it is accompanied. *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Farley v. Kustenbader*, 3 Penn. St. 418; *M'Glensey v. Fleming*, 4 D. & B. (N. C.) 129; *Wolf v. Fleming*, 1 Ired. (N. C.) 290; *Smith v. Eastman*, 3 Cush. (Mass.) 553; *Mumford v. Freeman*, 8 Met. (Mass.) 432. In like manner, if a promise to pay a debt barred by the statute, in goods, or the notes or bills of a stranger, has any legal validity which may be doubted, *Earle v. Oliver*, 1 Exch. 71; *Reeves v. Hearne*, 1 M. & W. 323, it cannot be binding without proof that the creditor assented to it at the time, and that the debtor subsequently refused to perform it, *Bush v. Brainerd*, 8 Johns. (N. Y.) 467; *Wolf v. Fleming*, 1 Ired. (N. C.) 290; *Taylor v. Stedman*, 11 id. 447; *M'Lellan v. Albee*, 17 Me. 184. But unless the qualification or condition really restricts or limits the meaning of the acknowledgment, it will be wholly immaterial, and may be disregarded by the creditor. *Whitney v. Bigelow*, 4 Pick.

(Mass.) 110; *Watkins v. Stevens*, 4 Barb. 168. And it has even been held that a promise to go to work and pay when able requires no proof of ability. *The First Congregational Society v. Miller*, 15 N. H. 820; *Butterfield v. Jacobs*, id. 52; *Cummings v. Gassett*, 19 Vt. 308. But these cases are opposed by the general course of decision, under which no recovery can be had on a promise to pay a debt barred by the statute, when able, without proof that the means of the debtor are such as to enable him to make the payment. *Tompkins v. Brown*, 1 Den. (N. Y.) 247; *Lafarge v. Jayne*, 9 Penn. St. 410; *Sherman v. Jacobs*, 1 Barb. (N. Y.) 254. It would appear that the creditor will be entitled to recover on proof of the fulfilment of the condition, however essentially it may qualify the acknowledgment, and that a promise to pay the debt, if proved, may be binding, though coupled with a denial that it is due, if sufficient proof of its existence can be brought to satisfy the jury impanelled to try the issue. *Dean v. Pitts*, 10 Johns. (N. Y.) 35; *Paddock v. Colby*, 18 Vt. 485; *Hill v. Kendall*, 25 id. 528.

¹ *Mattocks v. Chadwick*, 71 Me. 313.

² *Sedgewick v. Girding*, 55 Ga. 264. In a late case in Connecticut, *Norton v.*

money can be realized from the assets it shall be paid ;”¹ or, “ I think I see my way clear to pay you the \$200 and interest I owe you. I am in hopes another two years will enable me, from my present income, to clear off all pressing debts. Rest assured that not a day of pecuniary freedom will pass over my head without your hearing from me ;”² or, “ If you will buy C.’s land I will pay him the amount I owe you ;”³ or, “ I will pay as soon as I can ;”⁴ or, “ If A. will say I had the timber, I will pay for it ;” or, “ Prove it by A. and I will pay for it ;”⁵ or, “ I should be happy to pay it if I could ;”⁶ or, “ I will pay you when able,”⁷ or “ when of sufficient ability,”⁸ or “ when convenient,”⁹ or

Shepard, 48 Conn. 98, a debtor whose debt was barred by the statute of limitations said to his creditor with regard to it, “ I will pay it as soon as possible.” It was held to be a sufficient acknowledgment of the debt to take it out of the statute. “ The Connecticut statutes of limitation,” said LOOMIS, J., “ do not create an arbitrary bar to the recovery of a debt independent of the will of the debtor. If they did, a new promise would not avail the creditor unless founded on some new consideration, and in such case the action would have to be brought on the new promise. But the courts have always considered them mere statutes of repose, which suspend the remedy, leaving the debt uncanceled and still binding *in foro conscientie*. Hence it is well settled that the debt may be revived and the bar to its recovery removed by a new promise, either express or implied. Lord v. Shaler, 3 Conn. 132 ; Bound v. Lathrop, 4 id. 336 ; Austin v. Bostwick, 9 id. 496 ; Belknap v. Gleason, 11 id. 160 ; Phelps v. Williamson, 26 Vt. 230. In general, any language of the debtor to the creditor clearly admitting the debt and showing an intention to pay it will be considered an implied promise to pay, and will take the case out of the statute. Wooters v. King, 54 Ill. 343 ; Gailer v. Grennell, 2 Aik. (Vt.) 349 ; Phelps v. Stewart, 2 Vt. 216. And in this State an acknowledgment that a debt was once justly due and has never been paid will ordinarily authorize the inference of a promise to pay it. Sandford v. Clark, 29 Conn. 460.”

¹ Hanson v. Towle, 19 Kan. 273.

² Pierce v. Seymour, 49 Wis. 94.

³ Luna v. Edmiston, 5 Sneed (Tenn.), 159.

⁴ Tanner v. Smart, 6 B. & C. 602 ; Tompkins v. Brown, 1 Den. (N. Y.) 247 ; Bidwell v. Rogers, 10 Allen (Mass.), 438.

⁵ Robbins v. Otis, 1 Pick. (Mass.) 368.

⁶ Ayton v. Bolt, 4 Bing. 105.

⁷ In Tebo v. Robinson, 100 N. Y. 27, it was held that ability to pay, within the meaning of a promise to pay a debt when able, cannot be fairly implied while the debtor, although in possession of property sufficient to pay the debt, is plainly insolvent, or where payment, if enforced, would strip him of his means of support ; nor is it within the contemplation of the parties that the debtor will pay out of earnings necessary for the support of himself or his family, or that he will pay to the prejudice of other creditors whose debts are absolute and unconditional. On the other hand, such a promise does not imply simply an ability to pay without embarrassment, or even without crippling the debtor’s resources and business.

In an action commenced in November, 1881, upon a written promise made by the defendant in October, 1872, to pay \$1,000, before that time loaned to him by the plaintiff, the moment he was able, the defence was the statute of limitations. It appeared that for some time prior to November, 1875, the defendant had a balance to his credit in bank at all times, sometimes more and sometimes less than plaintiff’s claim. Also, that the defendant, from prior to 1873, was a member of the New York Stock Exchange, and that his seat, in 1875, was worth \$5,000. Whether he owed any other debts than that to plaintiff did not

⁸ Jacobs v. Scales, 3 Bing. 648.

⁹ Edmunds v. Dacons, 2 C. & M. 459.

“as soon as it is in my power to do so;”¹ or, “I should be happy to

appear. The plaintiff testified to a conversation with the defendant in October, 1875, in which the latter stated that he had not seen a time since he borrowed the money when he could pay it, and that the plaintiff could rest assured he would do so as soon as he was able. The court non-suited the plaintiff. Held, error; that it was a question of fact for the jury as to when the defendant became able to pay.

Love v. Hough, 2 Phil. (Penn.) 350; In *Davies v. Smith*, 4 Esp. 36, the defendant, on being applied to for payment, said: “I think I am in honor bound to pay the money, and shall do it when I am able.” LORD KENYON, in passing upon the sufficiency of this acknowledgment, said: “That is not sufficient. The plaintiff should show that the defendant was of sufficient ability to pay when he was sued. I remember a case in which SERJEANT NARES was of counsel, which turned upon this point. He contended that every man was regarded in law as able to pay his debts, for *solvat per corpus, qui non potest crumend*; but the distinction is too fine.” In this case the plaintiff then offered to show that since the promise was made the defendant had inherited £3,000 from his grandfather; but it appearing that whatever benefit the defendant had derived under the will he was then in debt infinitely beyond it, and was, in fact, in consequence of his difficulties, forced to live out of the kingdom, it was held that the acknowledgment did not revive the debt; and LORD KENYON ruled that it was a conditional promise only, and that the plaintiff was bound to show that the defendant was then of sufficient ability to

pay, adding, that it had been so ruled before, by LORD C. J. EYRE. This case was tried July 1, 1801. If, after a debtor has promised to pay “when able” it is shown that subsequent to such promise he had the ability to pay, the statutory bar is removed, although at the time when suit was brought, the ability to pay did not exist. *Lange v. Caruthers*, 70 Tex. 718. A tort cannot be revived by an acknowledgment or promise. *Martins v. Lyon*, 84 Va. 331; *Dickens v. Storeman*, (Mich.) 41 N. W. 495. In *Track v. Weeks*, 81 Me. 325, it was held that an agreement to waive any and all objections to certain amounts on account of the statute and renewing the promise to pay any balance which should be against the debtor, made *after* the statute had run, was not sufficient to estop the debtor from setting up the statutory bar when the statutory bar has run. In *Manning v. Wheeler*, 13 N. H. 486, a question quite similar to that decided in *Davies v. Smith*, was raised. In that case the defendant said that, “if he was able, he should be willing to pay all his debts;” and it was shown that he subsequently inherited several thousand dollars. The court held that, if the defendant’s language could be regarded as referring to a future ability, it would mean an ability to pay all his debts, and that without proof of such ability the action could not be sustained. The court held, however, that the debtor’s language must be treated as referring to and depending on his ability at the time when it was used, and that the burden of establishing such ability rested upon the plaintiff. See also, upon this point, Wake-

¹ *Haydon v. Williams*, 4 M. & P. 811. In *Sedgewick v. Gerding*, 55 Ga. 261, it appeared that on Dec. 31, 1872, a suit was commenced on an open account contracted in September and October, 1868. To avoid the statute of limitations, and as an independent ground of recovery, a letter from the defendant, written May 21, 1868, was relied upon, which was as follows: “Gentlemen, — In reply to your favor of the 22d instant you will please to withdraw your draft of \$314.37,

upon me, as I cannot pay for the present. As soon as I have the money I shall remit.” And the court held that it was too indefinite to avoid the statutory bar, or as an independent ground of action. In *Betton v. Cutts*, 11 N. H. 170, the debtor admitted that the claim was just, and said he would pay it if he ever received anything on a certain claim, and after his decease his administrator received a dividend upon that claim, it was held that the condition was fulfilled and the debt revived.

pay if I could ;”¹ or, “ You shall have your pay if I live, and the whaling business does not fail ;”² or, “ I am going to H. in the course of a

man *v. Sherman*, 9 N. Y. 88 ; and holding a doctrine adverse thereto, *Sumatt v. Homer*, 30 Ill. 429 ; *Cummings v. Gassett*, 19 Vt. 308. In a recent case in Connecticut, the court held that where a debtor, on being presented with a claim, says, “ I will pay it as soon as possible,” it is a sufficient acknowledgment to take the debt out of the statute. The court said : “ In *First Congregational Society v. Miller*, 15 N. H. 520, the defendant’s language was, ‘ that he had not the money, but would pay as soon as he could,’ which was held not to be a conditional promise, because there was no certain event to which the words looked forward, and it was held as a sufficient acknowledgment to take the case out of the statute. In *Butterfield v. Jacobs*, p. 140 of the same volume, the defendant said ‘ he would go to work and would pay as fast as he could,’ in regard to which the court pronounced a similar opinion. In *Cummings v. Gassett*, 19 Vt. 308, the promise of the debtor was to pay ‘ as soon as I can,’ and it was held sufficient to remove the bar of the statute. In *Sluby v. Champlin*, 4 Johns. (N. Y.) 461, the defendant, on being arrested by the sheriff, promised to ‘ settle with the plaintiff if he would give him time for payment,’ which was held sufficient as an acknowledgment. *Quære*, Did it not amount to an express promise to pay ? In *De Forest v. Hunt*, 8 Conn. 180, the plaintiff having written to the defendant calling his attention to the fact that he had previously sent his account requesting payment, the defendant replied, ‘ Yours of the 12th instant came to hand this day, requesting to know what prospect I have of paying the demands against me. I am extremely sorry to say to you that the prospect, at present, is not very flattering, as it is utterly out of my power to pay anything ;’ which was held an unqualified and unconditional acknowledgment that the precise balance stated was at that time justly due the plaintiff. In *Brown v. Keach*, 24 Conn. 73, the plaintiff’s agent wrote to the defendant, calling his attention to the fact that he was indebted to the plaintiff by note, and the defendant replied, ‘ Yours of the 24th has been received, and in reply I

hardly know what to say ; but as you request an answer soon, I will say in return that I can’t tell you what I can do at present, but I have been thinking of coming to Woonsocket for some time, but will omit it until I hear from you again. I wish you by return mail to send me a true copy of all the claims that you hold against me in full dates ; that is, I want it word for word, and indorsements, &c., and state where your mother and sister are now living, and I will see them or write soon.’ This was held sufficient to remove the bar. In *Blakeman v. Fonda*, 41 Conn. 561, the debtor said to his creditor, ‘ If you will call in two weeks I will pay you something on the debt ; I cannot tell how much ;’ and the words were held an unqualified recognition of the defendant’s liability to pay the whole debt.” In *Pierce v. Seymour*, 52 Wis. 272, the language was, “ I think I see my way clear to pay you the \$200 and interest I owe you. I am in hopes another two years will enable me from my present income to clear off all pressing debts. Rest assured that not a day of pecuniary freedom will pass over my head without you hearing from me.” Held, not sufficient. In *Mattocks v. Chadwick*, 71 Me. 313, a promise to settle “ when I am able,” held not sufficient. The Connecticut courts probably give more effect to the statute than those of any other State, and, generally, the doctrines of that court are entitled to great consideration ; but upon this question we must believe that the doctrine stated in the text is not only better sustained by authority, but also by sound reason, than that announced in the first two cases cited from that State, and certainly is sustained by the great majority of the courts in this country, as well as by the uniform course of decision in England. The promise in the second case is conditional, and the condition is by no means trivial, but one of importance to the debtor, and, as he has a right to dictate terms to his creditor, the creditor must take his promise subject to such terms as he sees fit to impose.

¹ *Ayton v. Bolt*, 4 Bing. 105.

² *Mumford v. Freeman*, 8 Met. (Mass.) 432.

week, and will help you to £5 if I can,"¹ — are all conditional acknowledgments which are inoperative, unless it is shown that the condition has been performed, the burden of establishing which is upon the plaintiff.² An offer to pay a debt upon which the statute had run, in "Confederate money," which was not accepted by the plaintiff, was held insufficient to take the debt out of the statute.³

In an English case the defendant had written to one of the plaintiffs as follows: "My Dear Sir, — The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the mean time, you will let your clerk send me an account of how it stands." It was claimed by the defendant that the letter did not take the case out of the statute, the time limited by which would otherwise have run. It was, however, held, on an appeal by a majority in the Exchequer Chamber, COLERIDGE, C. J., dissenting, that the promise in the letter was sufficient.⁴ In another case, where there was in effect a promise to pay on alternative conditions, forbearance to sue was said to be sufficient evidence of the acceptance of one condition by the plaintiff.⁵ And a promise to pay in a particular manner will not revive the debt generally.⁷

When there was an agreement signed by certain persons to refer accounts between them to arbitration, and the arbitrators were empowered to ascertain by their award what was due and payable, and to order the same to be paid at such time and in such proportion as the arbitrators should think fit, it was held, on the arbitration proving abortive, that the agreement only amounted to a conditional promise to pay the amount found due by arbitration, and that as the condition was unfulfilled there was no effectual acknowledgment.⁸

As an acknowledgment of a debt simply avoids the statute by the implication it affords of a new promise, an acknowledgment, though otherwise sufficient, if made obviously on some other account, may be held insufficient.⁹ Thus, in one case it was so held where the acknowledgment consisted in the fact that a surety had written to authorize the

¹ Gould v. Shirley, 2 M. & P. 581.

² Manning v. Wheeler, 13 N. H. 486; Davies v. Smith, *ante*; Carroll v. Forsyth, 69 Ill. 127. In Walker v. Cruikshanks, 23 La. An. 252, a proposal by an executor to pay a note against the estate, "if the holder will throw off the interest," was held sufficient to suspend the statute, although the offer was not accepted. But in McDonal v. Underhill, 10 Bush (Ky.), 584, a similar acknowledgment or offer was held sufficient only as to the principal, and did not extend to the interest due thereon.

³ Simonton v. Clark, 65 N. C. 525; 6 Am. Rep. 752; McCranie v. Murrell, 22 La. An. 477.

⁴ Chasemore v. Turner, L. R. 10 Q. B. 500. See also Smith v. Thorne, 18 Q. B. 143.

⁵ Sidwell v. Mason, 2 H. & N. 306; Collis v. Stack, 1 id. 605.

⁶ Wilby v. Elgee, L. R. 10 C. P. 497. 501.

⁷ Cawley v. Furnell, 12 C. B. 291.

⁸ Hales v. Stevenson, 9 Jur. N. S. 800.

⁹ Cripps v. Davis, 12 M. & W. 159.

creditor to receive a dividend upon his debt from the principal debtor.¹

SEC. 78. **Hope to pay.** — Where an acknowledgment has been given, followed by an expression of “hope” that the debtor will satisfy his debt, it has often been doubted how far that expression has cut down the implied promise.² On this point BRAMWELL, B., said: “It seems to me a mistake has been made in several cases with respect to the expression of hope in holding that, because along with an unconditional acknowledgment of a debt a man expresses a hope to be able to do that which he is legally obliged to do, such an acknowledgment is not sufficient.”³

In another case⁴ the defendant had written to his creditor as follows: “Your letter has reached me at last, after having been half over England. It is quite true that I have not sent you any money for years, but I really have none of my own. We just manage to exist on my wife’s, or at least what is left of hers. We have hard work to get on, but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavor to send you a little next week.” This letter was held by a majority of the Court of Exchequer, MARTIN, B., dissenting,⁵ to be a sufficient acknowledgment.

In a Wisconsin case⁶ the defendant wrote as follows: “I think I see my way clear to pay you the \$200 and interest I owe you. I am in

¹ Cockrill v. Sparkes, 1 H. & C. 699.

² Hart v. Prendergast, 14 M. & W. 741; Rackham v. Marriott, 2 H. & N. 196. In Hancock v. Bliss, 7 Wend. (N. Y.) 267, the debtor admitted the debt, but said “it was not in his power to pay it at the time, but he hoped to see the plaintiff and do something about it;” and it was held not a sufficient acknowledgment to raise a promise by implication to take the debt out of the statute.

³ Sidwell v. Mason, 2 H. & N. 310.

⁴ Lee v. Wilmot, L. R. 1 Ex. 364.

⁵ He said: “In my opinion this letter is not a sufficient acknowledgment. I consider the law to be correctly laid down in 2 Wms. Saunders, 64 A, note c, in the note to Hodsden v. Harridge, that ‘an acknowledgment operates only as evidence of a promise to pay; and accordingly that upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied; but that where the party guards his acknowledgment, an implication will not arise. Thus, a refusal to pay will prevent the implication of a promise arising from

such an acknowledgment; and a conditional promise to pay when able will prevent an absolute promise from being implied.’ I think the proper mode of deciding questions of this nature is, not by discussing other documents, but by giving a fair and candid construction to the one which is before us, and seeing whether, so construed, it contains a promise to pay. Now, if the letter stopped at the words ‘to get on,’ it is impossible to say that there would be any promise or acknowledgment; and when the debtor further says, ‘but I will try to pay you a little at a time if you will let me,’ this means (the letter being written before the debt was barred), if you will not sue me I will do my best to pay you what I can. The fair and reasonable construction is, I think, the debtor engages that he will do his best to endeavor to pay, that he will pay as he is able; and this excludes the implication of the absolute promise sued upon;” and we submit that this opinion is in harmony with the English cases previously cited.

⁶ Pierce v. Seymour, 49 Wis. 94.

hopes another two years will enable me from my present income to clear off all pressing debts. Rest assured that not a day of pecuniary freedom will pass over my head without you hearing from me ;” and it was held insufficient to take the debt out of the statute.

Under this head may properly be embraced offers of compromise. If a debtor in whose favor the statute has run offers to compromise the claim by paying a smaller sum than is due, or to pay it in a certain kind of property, the offer does not operate as an acknowledgment of the debt, so as to remove the statutory bar, even to the extent of the sum offered, unless the offer is accepted when made ; and if accepted, only relieves the operation of the statute to the extent of the offer.¹ This rule was well illustrated in a Connecticut case.² In that case, after the statute had run the debtor was reminded of the note by the plaintiff, and of the fact that it had not been paid, and he said, “ I will give you a ton of coal for it,” which offer was not accepted, and it was held that it did not relieve the debt from the operation of the statute. “ The offer of the defendant,” said SERMOUR, J., “ to give a ton of coal for the note was not accepted. It was a mere offer of compromise, and clearly no acknowledgment to take the case out of the statute.” In a Missouri case³ the defendant wrote the plaintiff that he had a certain sum of money, “ and I propose giving it all up to my creditors, — that is, the creditors of Lea & Rubey, — to be equally distributed between them, provided they will entirely release me from further obligation.” The plaintiff did not accept the offer, and it was held that it did not take the debt out of the statute. “ Instead of an admission,” said WAGNER, J., “ it was an offer of compromise, and a promise to pay part for the whole, and as the offer was not accepted the liability did not accrue.” In a North Carolina case⁴ the defendant offered to pay the note in suit in Confederate notes or in bank-bills, but the plaintiff refused either, and demanded gold. The court held that this was not a sufficient acknowledgment to take the debt out of the statute. “ The act of the defendant’s testator,” said DICK, J., “ was a mere offer to pay in the currency then in circulation, and no intention was in any way shown of assuming or renewing the obligation. We think the proper inference to be drawn from the evidence is, that the defendant’s testator was willing to pay the debt in the currency of the country,

¹ *Mumford v. Freeman*, 8 Met. (Mass.) 432; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Smith v. Eastman*, 3 Cush. (Mass.) 355; *Pearson v. Harper*, 11 La. An. 184; *Bates v. Bates*, 83 Ala. 102; *Lucas v. Thorington*, 5 id. 504; *Pearson v. Darrington*, 33 id. 227; *Parsons v. Northern, &c., Iron Co.*, 86 Ill. 430; *Slack v. Norwich*, 32 Vt. 818; *Neal v. Abbott*, 2 Cranch (U. S. C. C.), 193; *Glensey v. Fleming*, 4 D. & B. (N. C.)

L. 129; *Ash v. Hayman*, 2 Cranch (U. S. C. C.), 452; *Bank of Columbia v. Sweeney*, 3 id. 293; *Creuse v. Defiganeure*, 10 Bosw. (N. Y.) 122; *Pool v. Rolfe*, 23 Ala. 701; *Morehead v. Gallinger*, 9 Iowa, 519; *Hicks v. Thomas, Dudley* (Ga.), 218.

² *Currier v. Lockwood*, 40 Conn. 349.

³ *Chambers v. Ruby*, 47 Mo. 99, 4 Am. Rep. 318.

⁴ *Simonton v. Clark*, 65 N. C. 525.

which was then abundant; and as that was refused, his purpose was to rely upon the statute of limitations."

In a Massachusetts case¹ the maker of a note agreed with the holder to pay him a certain proportion of the amount due in full discharge of the note, and afterwards made and signed a note for the amount so promised, and offered it to the holder in payment of the first note. The holder refused to receive it, and it was held that that was not such an acknowledgment as took the first note out of the statute. In a New Hampshire case,² a few days before the statute had run upon a claim, the plaintiff sent to the defendant a proposition that if he would make her a wagon worth \$75 she would give up the note. The defendant said that he could not make her such a wagon then, but would do so next year. The plaintiff made no reply to the defendant's proposition to make the wagon the next year, and the court held that the promise was not binding, and did not suspend the operation of the statute upon the note.

It is unnecessary to multiply illustrations upon this point, as any different doctrine from that stated in the text would be subversive of the principles upon which the doctrine relative to acknowledgments rests.

A distinction is observed between the construction put upon a letter written or an acknowledgment made a short time after the debt has been contracted, and one written after the debt is barred. In the latter case, effect is properly given to anything which savors of a condition; but where a person, being then a debtor who has no right to time, writes a letter asking for time, the reasonable construction is, that it is no condition, and that the writer has no intention of imposing a condition.³ Thus, in the case last cited, before the statute had run upon the claim, the defendant wrote the plaintiffs as follows: "In reply to your statement of account received, I am ashamed the account has stood so long; I must beg to trespass on your kindness a short time longer, till a turn in trade takes place, as for some time things have been very flat." This was held such an unconditional acknowledgment of the debt as to sustain an implied promise to pay the debt, and rebut the statutory bar.⁴

¹ *Smith v. Eastman*, 3 Cush. (Mass.) 355. In *Price v. Price*, 34 Iowa, 401, it was held that a promise to pay a debt already barred by the statute which substitutes a different mode of payment, or that is not founded on a new consideration, is not sufficient to remove the statute bar.

² *Batchelder v. Batchelder*, 48 N. H. 23.

³ *POLLOCK, C. B.*, in *Cornforth v. Smithard*, 5 H. & M. 14.

⁴ *Godwin v. Culley*, 4 H. & M. 378; *Sidwell v. Mason*, 2 id. 306; *Eicke v. Nokes*, 1 Moo. & Ry. 359. In *Evans v. Jones*, 9

Exch. 282, it appeared that in 1845 J. lent the plaintiff £200, on the security of the joint and several promissory note of himself and two sureties. Between November, 1845, and February, 1847, J. bought of the plaintiff goods to the amount of £17. In July, 1847, the plaintiff remitted J. £10 for interest due on the note, and at the same time sent his bill for the goods. J. wrote in answer: "I beg to acknowledge the receipt of £10 cash, and the bill amounting to £17, both of which sums I have placed to your credit. I have enclosed your bill; receipt it, and return it

SEC. 79. **By and to whom must be made.**—It was formerly held in England,¹ as well as in the courts of this country,² that an acknowledgment of a debt to a stranger was as effectual to remove the statute bar as one made to the creditor himself. But under the modern rule, that an acknowledgment must be such as fairly raises an implied promise to pay the debt, it follows as a matter of course that the acknowledgment or promise must not only be made by a person legally competent to contract,³ but must also be made to the creditor himself, or some person duly authorized to act for him in that regard, so that a new contract, resting upon the old one for its consideration, may be set up in reply to the statute, if it is pleaded by the defendant;⁴ and if it is made

to me by post." It did not appear whether the plaintiff had sent back the bill receipted. In February, 1853, and after the death of J., the promissory note was paid by one of the sureties, without taking credit for the £17. In May, 1853, the plaintiff sued the administratrix of J. for the £17, when she pleaded the statute of limitations. It was held that the above letter was a sufficient promise, within the 9 Geo. IV. c. 14, to take the case out of the statute of limitations. In this case it was urged that, unless the plaintiff receipted the bill as directed in the letter, the letter could not be regarded as an acknowledgment of the debt stated in it, as it was a mere offer to pay the bill by giving credit for the amount, and went for nothing unless accepted, under the rule in *Ashby v. James*, 11 M. & W. 542; but the court repudiated this claim. "We are bound," said POLLOCK, C. B., "to put a reasonable construction on this letter. Then, did not the person who wrote it mean to say, in substance, 'I have received the goods; I owe you a debt in respect to them which I will pay you; and I propose, as a convenient mode of payment, to set off the amount against the debt which you owe me' . . . It was never meant by the letter that there should be a peculiar mode of payment which should do away with the effect of the unqualified acknowledgment."

¹ *Peters v. Brown*, 4 Esp. 46; *Halliday v. Ward*, 3 Camp. 32; *Clark v. Hougham*, 2 B. & C. 149; *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Yea v. Fouraker*, 2 Burr. 1099.

² *Newkirk v. Campbell*, 5 Harr. (Del.) 380; *St. John v. Garrow*, 4 Port. (Ala.) 223; *Oliver v. Gray*, 1 H. & G. (Md.) 204;

Whitney v. Bigelow, 4 Pick. (Mass.) 110; *Minkler v. Minkler*, 16 Vt. 194.

³ Neither an acknowledgment or promise, made by an executive officer of the government, is binding upon the latter, unless by some act of Congress they have express or implied authority to that end. *Leonard v. U. S.*, 18 Ct. of Cl. 382. *Hannum's Appeal*, 9 Penn. St. 471; *Ward v. Hunter*, 6 Taunt. 210; *Tanner v. Smart*, 6 B. & C. 603; *Putnam v. Foster*, 1 id. 246; *Chapman v. Dixon*, 4 H. & J. (Md.) 527; *Atkins v. Tregold*, 2 B. & C. 23; *Quarles v. Littlepage*, 2 H. & M. (Va.) 406; *Fisher v. Duncan*, 1 id. 563.

An acknowledgment in order to take a claim out of the operation of the statute, must have been made by the debtor himself or by a person duly authorized by him to make such acknowledgment. A general agent has no such authority. *McMullen v. Rafferty*, 89 N. Y. 456; *Miller v. Magee*, 2 N. Y. Supp. 156; *Tate v. Hawkins*, 81 Ky. 577; *Havlock v. Ashbury*, 19 L. R. Ch. D. 539; *Huntington v. Chesmore*, 60 Vt. 566; *McDonald v. McDonald*, 7 N. Y. Supp. 935; *Ryal v. Morris*, 68 Ga. 534; *Little v. Edwards*, 69 Md. 499; *Zoll v. Carnahan*, 83 Mo. 35; *Morgan v. Bank*, 13 Lea (Tenn.), 284; *Nunbold v. Smith*, 33 Ch. D. 127; *In re Hollingshead*, 37 Ch. D. 451. In all the cases cited above it will be found that authority express or fairly implied, existed. The rule in the case of an acknowledgment by an agent should, however, be very carefully guarded.

⁴ *Ringo v. Brooks*, 26 Ark. 540; *Tusen v. Camblin*, 1 Ill. App. 424; *Niblack v. Goodman*, 67 Ind. 174; *McGreer v. Forsyth*, 80 Ill. 96; *Faison v. Bowdoin*, 76

to an agent of the creditor, in order to make it operative it must appear that the debtor at the time knew that the person to whom the acknowl-

N. C. 425; *Walker v. Albee*, 80 Ill. 47; *Kirby v. Mills*, 78 N. C. 124; *Trousdale v. Anderson*, 9 Bush (Ky.), 276; *Reeves v. Corell*, 19 Ill. 189; *Cape Girardeau Co. v. Harkinson*, 58 Mo. 90; *Sibert v. Wilder*, 16 Kan. 176; *Carroll v. Forsyth*, 69 Ill. 127; *Pearson v. Darrington*, 32 Ala. 227; *Fleming v. Stanton*, 74 N. C. 203; *Parker v. Shuford*, 76 id. 219; *Zacharias v. Zacharias*, 23 Penn. St. 452. The acknowledgment from which a promise to pay a debt can be implied must be made to the creditor or some person acting for him, and not to a stranger. *Bloodgood v. Bruen*, 8 N.Y. 362. *Spangler v. Spangler*, 122 Penn. St. 858; *Cunkle v. Heard*, 6 Mackey (D. C.), 485. *PARKE, B.*, in *Badger v. Arch*, 10 Exch. 333. Prior to the adoption of the new theory in relation to acknowledgments initiated by *Tanner v. Smart*, *ante*, an acknowledgment made to a stranger was held just as operative to remove the bar of the statute as though it had been made to the creditor himself, the only question being whether it was made in earnest or in jest. In *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86, the defendant, being at a tavern with a party of friends, said to them that he had paid off every debt except one five-hundred-dollar note which he owed to the bank, and could pay off at any time; and it was held that this was not sufficient to remove the statute bar, because the place and the occasion and manner in which the declaration was made were such as to repel the inference that it was intended as a serious admission that the debt still existed against him so as to impose a duty upon him to pay it. See *Wainman v. Kynman*, 1 Exch. 118, where this was held a question for the jury. In England, prior to the passage of LORD TENTERDEN's act, and while the theory as to presumptions arising from the statute prevailed, it was held to be immaterial whether the acknowledgment or promise was made to the creditor or a stranger, and such was the rule in this country; and as that statute, upon a fair construction, did not affect this question, the change in the rule is due entirely to a change in the theory of the law in this regard. Illustrative of this rule is *Mountstephen v.*

Brooke, 3 B. & Ald. 141, in which, in a deed made between the defendants and a third person, admission was made by the defendants of a debt due to the plaintiffs, who were strangers to the deed, and it was held sufficient; *ABBOTT, C. J.*, remarking, that the legal effect of an acknowledgment, even though made to a stranger, was itself sufficient to raise a promise to pay. Again, in *Halliday v. Ward*, 3 Camp. 32, where the defendant, a Quaker, wrote to his father, who was a co-obligor with him on a promissory note, as follows: "With regard to Halliday's money, thou must settle it thyself," LORD ELLENBOROUGH said that the letter acknowledged the existence of the debt, and that the promise to pay (although the debt was not acknowledged to the plaintiff) was raised by law. So, in *Clark v. Hougham*, 2 B. & C. 149, an admission to one of the several parties was held to inure for the benefit of all for the purpose of the statute of limitations; and though it was suggested that the admission was made to one as the agent of the others, it was expressly stated by *BAYLEY, J.*, that agency was not necessary to be proved. So far it might seem that, as well under the new theory of acknowledgment as under the old, an admission to a third person was deemed sufficient, as it might be gathered from these remarks that a promise to pay a creditor may be implied from an admission not made to him personally. There are, however, a large number of more recent judicial decisions on the other side, and holding the only consistent doctrine that such an acknowledgment is not sufficient. Thus, in *Godwin v. Culley*, 4 H. & M. 375, *MARTIN, B.*, distinctly laid down that an admission to a third person is not sufficient for the purpose, and *BRAMWELL, B.*, expressed a similar opinion. And again, in *Grenfell v. Girdlestone*, 2 Y. & C. 662, *ALDERSON, B.*, expressly raises and decides the point. "If," says he, "a man were to write a letter to a third person acknowledging the debt, it would not take it out of the statute;" and the doctrine there announced has ever since prevailed in that country, and is the rule prevailing in this. *Kyle v. Wills*, 13 Penn.

edgment or promise was made was acting as the agent of the creditor, or was made to a person under such circumstances as show an intention on the part of the debtor that such person should communicate the acknowledgment to the creditor, so that such person may fairly be said to be the debtor's agent for that purpose,¹ or it will have no more effect than it would have if made to a stranger.² But it has been held that a promise or acknowledgment made to the creditor or his authorized agent will inure to the benefit of his assignee.³ So, too, the acknowledgment must be made by a person who is legally competent to contract; because, as the acknowledgment, to be operative, must be such as to raise a new contract to pay, resting upon the old debt for its consideration, it follows as a matter of course, that at the time when the acknowledgment or promise was made the party must have been competent to contract, so that he could be legally bound; and if he was resting under any legal disability at the time, it will be inoperative;⁴ and, except where the statute otherwise so provides, where an acknowledgment in writing is required, it is held that the acknowledgment must be made by the debtor personally.⁵ Where, however, the stat-

St. 286; *Gillingham v. Gillingham*, 13 id. 302; *Bloodgood v. Bruen*, 8 N. Y. 362, and cases previously cited in this section.

¹ *Bachman v. Roller*, 9 Baxt. (Tenn.) 409, 40 Am. Rep. 97. In *De Freest v. Warner*, 98 N. Y. 217, it was held that an acknowledgment of indebtedness made by a debtor to a stranger, with the intention that it shall be communicated to and influence the creditor, is as effectual to defeat the statute of limitations as if made to the creditor or his authorized agent. Thus the maker of certain promissory notes conveyed his real estate to his sons by deed containing a clause to the effect that the lands were conveyed subject to and charged with the payment of the notes; that they formed part of the consideration, and that the grantees assumed and agreed to pay the same. In an action upon the notes, where the statute was pleaded as a bar, it was held that the acknowledgment in the deed must have been intended to be communicated to and to influence the action of the holder of the notes, and, as the action was commenced within six years after such acknowledgment, that it was not barred.

² *McKinney v. Snyder*, 78 Penn. St. 497.

³ *Pinkerton v. Bailey*, 8 Wend. (N. Y.) 600. But see *Cripps v. Davies*, 12 M. & W. 159.

⁴ *Kline v. Guthart*, 2 Penn. 490; *Richmod, Petitioner*, 2 Pick. (Mass.) 567.

An acknowledgment must be made to the creditor or his agent. *Croman v. Stall*, 119 Penn. St. 91; *Fort Scott v. Hickman*, 112 U. S. 150; *Roscoe v. Hale*, 7 Gray (Mass.), 274; *Comer v. Allen*, 72 Ga. 1; *Niblack v. Goodman*, 67 Ind. 174; *Duguid v. Scofield*, 32 Gratt. (Va.) 803; *Hussey v. Kirkman*, 95 N. C. 68; *Clauson v. McKune*, 20 Kan. 337; *Hargis v. Smell*, 87 Ky. 63; *McKinney v. Snyder*, 78 Penn. St. 497; *Libby v. Robinson*, 79 Wis. 168; *Maxwell v. Reilly*, 11 Lea (Tenn.), 307; *Ackerman v. Sherman*, 9 N. Y. 91; *In re Kendrick*, 107 N. Y. 104. In New York it is held that an acknowledgment to a third person, *with the intention that it shall be communicated* to the creditor, is sufficient, *De Freest v. Warner*, 98 N. Y. 217, and there is *dicta* in many cases to the same effect. *Bachman v. Roller*, 9 Baxt. (Tenn.) 409. But it will be seen that this necessarily involves the rule stated *supra*, because under such circumstances the debtor makes the stranger his agent, for the purpose of renewing the debt.

⁵ *Hyde v. Johnson*, 3 Scott, 289; *Pott v. Clegg*, 16 M. & W. 321; *Gibson v. Baghatt*, cited in *Whippy v. Hillary*, 5 C. & P. 209.

ute does not require that the acknowledgment should be made in writing and signed by the party to be charged, and it is not made by the debtor in person, it must be made by some person by him thereto legally authorized.¹ But, under the statute of James, it was held that the acknowledgment might be made either by the defendant in person or by his agent, and power to acknowledge might be implied. Thus, in one case,² where an agent was employed to pay money for work done, and the workmen, with his consent, were referred to him for payment, it was held that an acknowledgment or promise made by him was sufficient to remove the statute bar; and in another case,³ LORD ELLENBOROUGH lays down the general rule, that if a man refers another upon any particular business to a third person, he is bound by what this third says or does concerning it, as much as if that had been said or done by himself. Under this rule an admission by a wife, who was accustomed to conduct the business of her husband, was held sufficient to take the case out of the statute in an action against the husband.⁴ And where goods were supplied to a wife usually living apart from her husband, for her own use, she was considered to be her husband's agent for the purpose of making an acknowledgment.⁵ But a married woman cannot effectually acknowledge a debt contracted *dum sola*.⁶ Under the rule as stated, that an acknowledgment or promise, in order to take a debt out of the statute, must be made to the creditor or his agent, it follows as a matter of course that a recognition or admission of a debt, in a paper or document not intended for the creditor,⁷ or which, if he is a party thereto, was never delivered to him,⁸ cannot have the effect to raise a new promise to pay the debt. Thus, the entry of a check on the books of the drawer as unpaid; ⁹ the insertion of a debt in the schedule of debts filed and sworn to in insolvency proceedings; ¹⁰ a private memorandum of the debt in a book of the defendants; ¹¹ a written acknowledgment of the debt, found among the debtor's papers after his decease; ¹² or a mortgage duly executed, to secure the payment of the debt, but never delivered,¹³ — have all been held insufficient to renew the debt. So, too, it is held that a debt is not revived by a clause in the debtor's will, direct-

¹ Ringo v. Brooks, *ante*.

² Burt v. Palmer, 5 Esp. 145.

³ Williams v. Innes, 1 Camp. 364.

⁴ Anderson v. Sanderson, Holt N. P. 591.

⁵ Gregory v. Parker, 1 Camp. 394.

⁶ Pittam v. Foster, 1 Barn. & Cr. 248.

⁷ Merriam v. Leonard, 6 Cush. (Mass.) 151.

⁸ Allen v. Walton, 70 Mo. 138.

⁹ Harmon v. Claiborne, 1 La. An. 342.

¹⁰ Hidden v. Cozzens, 2 R. I. 401; Christy v. Flemington, 10 Penn. St. 129;

Brown v. Bridge, 2 Miles (Penn.), 424;

Georgia Ins. Co. v. Endicott, Taney (U. S.), 130; Richardson v. Thomas, 13 Gray (Mass.), 381. But an inventory and affidavit of a debt, made for the purpose of securing a discharge from the debt in insolvency, has been held sufficient, Bryan v. Wilcox, 3 Cow. (N. Y.) 159; as in such a case the creditor may be said to be a party to the proceedings.

¹¹ Edwards v. Culley, 4 H. & M. 378, POLLOCK, C. B.

¹² Allen v. Walton, 70 Mo. 138.

¹³ Merriam v. Leonard, 6 Cush. (Mass.) 151.

ing that all his just debts shall be paid,¹ nor will such direction stop the running of the statute.²

In all the cases where a contrary rule is adopted, it will be found that the question arose, and was decided under the old theory that the statute raises a presumption that the debt has been paid, and that the debtor has lost the evidence thereof, and an acknowledgment rebuts this presumption, or that the case is distinguishable from these, and the acknowledgment or promise was made under such circumstances that the creditor not only had a right to rely upon, but could legally enforce it; and this condition exists when it is predicated upon a new consideration, or the circumstances are such as to show that the debtor intended that it should be communicated to the creditor, or that it should renew the debt;³ and this intention may be implied from the circumstances. Thus, where a dying man said to a bystander that he owed the plaintiff a certain sum for a slave, which he desired to have paid,⁴ it was held a sufficient acknowledgment; and, although this was held at a time when the old theory prevailed, it is equally applicable under the new, because it shows an intention on the debtor's part to have the debt kept on foot. In a late case before the General Term in New York,⁵ the defendant, as one of the executors of the testator embraced in an inventory of the assets of the estate, made and verified by him in the usual form, certain notes given by him to the testator in his lifetime, and upon which the statute had run, and it was held a sufficient acknowledgment in writing to take the notes out of the statutes. BRADY, J., in delivering the opinion of the court, after adopting the rule as to the character of an acknowledgment required to take a debt out of the statute, as held in the courts of that State,⁶ said: "It seems to be impossible reasonably to draw any other inference from the statement of them (the notes in suit) as assets, when he had it in his power to characterize them as outlawed and valueless. He could, at least, have assumed that attitude, but there is no evidence that he did so. . . . The statement of the notes as assets is in itself sufficient to take them

¹ *Smith v. Porter*, 1 Binn. (Penn.) 209; *Agnew v. Fetterman*, 4 Penn. St. 56.

² *Rush v. Fales*, 1 Phila. (Penn.) 463.

³ *Jordain v. Hubbard*, 26 Ala. N. S. 433; *Collett v. Frazier*, 3 Jones Eq. (N. C.) 86.

⁴ *Collett v. Frazier*, *ante*.

⁵ *Ross v. Ross*, 6 Hun (N. Y.), 80 (1st dept.). See also *Behrens v. Boutté*, 31 La. An. 112, where a similar doctrine was held as to a debt presented against the estate, and which the executor entered as a claim against the estate to be paid. But see *Bell's Estate*, 25 Penn. St. 92, where, under a similar state of facts, the insertion of his own note in the inventory of the

estate was held not sufficient to estop the executor from setting up the statute to defeat the same; and we are inclined to believe that this is the better rule, as such an act can hardly be said to be voluntary, but is merely done in the performance of a duty required and imposed by law.

⁶ *Winchell v. Hicks*, 18 N. Y. 560; *Masher v. Hubbard*, 13 Johns. (N. Y.) 510; *Frost v. Benough*, 1 Bing. 266; *Bloodgood v. Bruen*, 8 N. Y. 368; *Turner v. Martin*, 4 Robt. (N. Y. S. C.) 661; *Loomis v. Decker*, 1 Daly (N. Y.), 186; *Com. Mut. Ins. Co. v. Brett*, 44 Barb. (N. Y.) 489; *McNamee v. Tenney*, 41 id. 506.

out of the statute.”¹ In a Maine case,² the defendant, who was treasurer of the plaintiff corporation, as such made charges against himself in the corporation books for interest on a note given by him to the corporation, and it was held such an acknowledgment of the note as removed the statutory bar.³ There is also a class where, although the acknowledgment or promise was not made directly to the creditor or his agent, yet being made for the purpose of deriving, and having derived, an advantage therefrom, it is, in effect, held that he is estopped from setting up the statute, upon the ground that he cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation. That is, where a debtor under such circumstances derives an advantage from the acknowledgment, he is treated as having intended that it should be accepted as such, and confided in by the creditor.⁴ In the case last cited, in which this question is carefully and ably considered, it was held that where a maker of a note, in a deposition made by him in a case to which the payee of the note was not a party, swore that the note was an outstanding obligation against him, for the purpose of getting credit for the note as to be paid by him, and upon which he did obtain such credit, the acknowledgment was such that the creditor could avail himself of in answer to a plea of the statute, set up to defeat an action upon the note. The court said: “The next and only remaining ground of error is, that the plaintiff, not being a party to the suit in which the deposition was taken, the statements therein cannot be construed as admissions or acknowledgments made to him, and that no promise of payment can be implied from an acknowledgment of a debt so as to take it out of the operation of the act of limitations, unless such acknowledgment be made to the creditor to whom the debt is owing, or to some person representing him by authority.” The court referred to Joynes on Limitations, 120, where it is stated that the acknowledgment is sufficient if made to a third person, and proceed: “Since the publication in 1844 of this excellent treatise on limitations, there have been numerous decisions, both in England and the United States, adverse to the views expressed by the distinguished author; and it is said in a recent work of merit, that, according to the very decided weight of the latest decisions in this

¹ *Bryan v. Wilcox*, *ante*. In *Stuart v. Foster*, 18 Abb. Pr. (N. Y.) 305, JAMES, J., said: “The code does not define what the writing shall be; it merely requires the acknowledgment or promise to be in writing, signed by the party charged, and, for aught I can see, it can as effectually be made in a general assignment for the benefit of creditors as in any other instrument.”

² *Blue Hill Academy v. Ellis*, 32 Me. 200.

³ But *quære*, can such an acknowledgment be regarded as sufficient under the statute in Maine, which provides that no acknowledgment, &c., shall be sufficient, unless such acknowledgment or promise be an express one, and made or contained in some writing, signed by the party chargeable thereby?

⁴ *Duguid v. Scholfield*, 32 Gratt. (Va.) 803.

country, a promise to pay a debt, made to a person not legally or equitably interested in the same, and who does not pretend to have had any authority from the creditor to call upon the creditor in relation to the debt, will not avoid the bar of the statute."¹ The court, fully admitting and sustaining the doctrine that an acknowledgment or promise made to a stranger is inoperative, distinguishes the case in hand on the ground that the deposition was made to establish the validity of the debt, and gain him credit for it, and "he must therefore be understood to have intended that his acknowledgment of the debt, under the attending circumstances, should be accepted as such, and confided in and acted upon by the creditor to whom the debt was due. He cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation." With the exceptions named, it is now generally held that a debt cannot be revived through the instrumentality of casual conversation with persons neither legally nor equitably interested in the debt.

SEC. 80. Offer to arbitrate, Recital in Deeds, &c. — Under the old rule, that a naked admission that a debt existed would remove the statute bar, although the words and acts of the parties repelled the inference of a promise to pay, an offer or agreement to refer or arbitrate claims barred by the statute was held sufficient;² but under the rule now existing, that an acknowledgment must be such that a promise to pay can be implied, such an agreement of itself would be insufficient.³ So, too, under the old rule, a recital in a deed to which the creditor was not a party, of a debt barred by the statute, was held sufficient to revive the debt;⁴ but the question as to whether such a recital would now be deemed sufficient is dependent upon the circumstance whether it is made under such circumstances that the creditor can rely upon it as a promise to pay the debt in question, and may set it up in reply to a plea of the statute. In a Virginia case,⁵ referred to elsewhere in this work, this question is carefully considered; and the court, after a careful review of the cases, and the principles upon which this branch of the law rests, says: "The diversity in the earlier and later cases is attributable for the most part to the different and somewhat antagonistic theories entertained at different periods concerning the design and policy of the statute. Under the leadership of LORD MANSFIELD, it was for a long time considered, and held, that under the statute lapse of time raises a mere presumption of satisfaction, which, like other

¹ *Ringo v. Brooks*, 26 Ark. 540; *Gillingham v. Gillingham*, 17 Penn. St. 302; *Morehead v. Wriston*, 73 N. C. 398; *Wachter v. Albee*, 80 Ill. 47; *Kisler v. Sanders*, 40 Ind. 78; *Sibert v. Wilder*, 16 Kan. 176, 22 Am. Rep. 280; *Fletcher v. Updike*, 3 Hun (N. Y.), 350; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Trousdale v. Anderson*, 9 Bush, 276.

² *Conkling v. Thackston*, C. & N. 93; *Barney v. Smith*, 4 H. & J. (Md.) 496.

³ *Shaw v. Newell*, 1 R. I. 438; *Russell v. Gass*, Mart. & Y. (Tenn.) 353.

⁴ *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Clark v. Hougham*, 2 B. & C. 149; *King v. Riddle*, 7 Cranch (U. S.), 168.

⁵ *Duguid v. Scholfield*, 32 Gratt. (Va.) 803, 35 Am. Rep. 417, n.

presumptions, might be repelled; and hence that a new promise of the debtor, whether express or implied, was only evidence of the pre-existing debt, and gave no new cause of action. Subsequently this theory was overturned, and succeeded by a course of decisions, initiated and fostered by CHIEF JUSTICE BEST, which regarded and construed the statute as one of repose, and a new promise as a new contract, and actionable as such. This view is now generally adopted.¹ It would seem to follow logically that the promise, to be sufficient to take a case out of the statute, should be made directly or immediately to the creditor, or at least for his benefit, so that he may be able to maintain an action upon it. It is said that the declaration or admission to a third person is deemed insufficient, not so much because the acknowledgment is made to a stranger, as because there is no sufficient evidence of an intention to promise."² In this view of the law, which is the only view that is consistent with the present theory, which requires an acknowledgment to be of such a character that a new promise to pay the debt may be implied therefrom, sufficient to enable the creditor to set it up as a reply to the statute as a new ground of action, it follows that in order to make the recital of a debt due to a person not a party thereto, in a deed or other instrument, sufficient to remove the statute bar, it must be made under such circumstances and for such a purpose as to clearly indicate that the debtor intended that such recital should be confided in and relied upon by the creditor as an acknowledgment of the existence of the debt, and his intention to pay the same,³ and also in such a manner and under such circumstances that he can rely upon it as a distinct ground of action to rebut a plea of the statute. Thus, it has been held in Iowa that if a mortgagor, in a subsequent mortgage, or in a deed of the same premises, should refer to a prior mortgage, which is barred by the statute as unpaid, and a lien upon the premises, to which the deed or second mortgage is subject, it is a sufficient acknowledgment to take the prior mortgage out of the statute both as to the mortgagor and the mortgagee;⁴ and the same rule would apply to any instrument in which the debt is recited under such circumstances and in such language as to evince an intention on the debtor's part to keep the debt on foot, and to give the creditor the right to rely and act upon such recital. As if A., being indebted to B., enters into a written contract with C., by the terms of which C. agrees to pay A.'s debt to B., this would be a sufficient acknowledgment to create a new promise. That the recital of such a mortgage debt, in a subsequent mortgage before the statute has run thereon, does not operate as an acknowledgment in writing, as is required by the statute to keep the debt on foot for another statutory

¹ Sibert v. Wilder, 16 Kan. 176, 22 Am. Rep. 280.

² 1 Smith's Leading Cases, Part II. marg. page 976.

³ See Duguid v. Scholfield, *ante*.

⁴ Palmer v. Butler, 36 Iowa, 576.

period, has been held in the English courts; and this would seem to be the true rule.

Thus, in an English case,¹ under the statute 3 & 4 Wm. IV., requiring an acknowledgment or promise to be in writing, an action of covenant was brought on an indenture of mortgage of certain houses executed in 1824 by the defendant in favor of the defendant's testator; the plaintiff, in order to take the case out of the statute, gave in evidence a deed executed by the defendant within twenty years, but to which neither the plaintiff nor his testator was a party. The deed, after reciting that the defendant had executed a mortgage upon the property conveyed thereby to the plaintiff's testator, for securing to him the sum of £320 and interest, stated that he conveyed that and other property to trustees, on trust to sell, and out of the proceeds of the sale to pay off all the mortgages and other incumbrances affecting the property, and then to pay the creditors. The court held that this was not a sufficient acknowledgment in writing of the debt in question to take it out of the operation of the statute. The true amount of the mortgage in suit was £400; but it was satisfactorily proved that the mortgage recited in the deed was intended as the one in suit, and that the amount was stated at £320 by mistake. In passing upon the effect of this recital, **ROLFE, B.**, said: "Giving to the recital its fullest import, we can only understand it as a statement made by the defendant in January, 1829, that he had in June, 1824, conveyed the houses in question by way of mortgage to the plaintiff's testator, to secure £400, then due to him from the defendant, and that the mortgage still remained vested in the mortgagee. The recital would be quite true even though the mortgagee should have been in possession of the property, and should, out of the rents and profits, have fully satisfied himself his debt and interest. The trust to pay in the first instance all mortgages, charges, &c., amounts to nothing: it is no more than the trustees would have been obliged to do if no such trusts had ever been expressed, and, from the generality of its language, it evidently is a clause introduced by the conveyancer, without reference to the existence of any particular mortgage-deed." In a later case,² where a deed conveying the equity of redemption of certain lands contained a recital of a previous mortgage thereon, and stated that both the sum of £1,200 and £300, which the mortgage was given to secure, remained unpaid, "all interest for the same having been paid," up to the date of the deed, and the assignee of the equity covenanted to pay the mortgage, and it was proved that the assignee of the equity had paid the interest thereon regularly ever since, it was held a sufficient acknowledgment of the debt to keep it on foot for a period of twenty years from the date of the deed.

SEC. 81. When Acknowledgment must be made. — In some of the cases a distinction is made between the recognition of a debt before

¹ *Howcutt v. Bonser*, 3 Exch. 499.

² *Forsythe v. Bristowe*, 8 Exch. 721.

the statute has run upon it, and one upon which the statute has already run;¹ but the rule generally adopted, and the only tenable one, is, that it is immaterial whether the acknowledgment precedes or follows the bar,² as in all cases it is only necessary to establish the continued existence of the debt at the time when the action was brought. Formerly it was held that the recognition of a debt, even after action brought, was sufficient to remove the statute bar;³ but under the theory that an action upon such a claim can only be brought where an implied promise can be raised, it follows as a matter of course that the acknowledgment or promise must have been made before the action was brought.⁴

The distinction between the acknowledgment of a debt before and one after the statute has run consists merely in its effect upon the debt and the remedy. An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration.⁵ The plaintiff may, in the latter case, but not in the former, declare upon the new promise;⁶ but the practice in most of the States is to declare upon the old debt, and, when the statute is pleaded, to reply the new promise, and the issue is then upon the plea and the replication, the replication to that extent being treated as a declaration upon the new promise; and in most of the States this is held to be the only proper remedy, and is certainly the safest.⁷ And it makes no difference in this respect that the promise is conditional.⁸ If the debtor does not perform the conditions agreed to

¹ Bowdre v. Hampton, 6 Rich. (S. C.) 208; Deloach v. Turner, 7 id. 148; Young v. Monpoe, 2 Bailey (S. C.), 278.

² Ayers v. Richards, 12 Ill. 146; Little v. Blunt, 16 Pick. (Mass.) 359; Austin v. Bostwick, 9 Conn. 496; Carlton v. Ludlow Woollen Mill, 27 Vt. 496; Bowen v. Miller, 3 Clark (Penn.), 326; McWilliams's Estate, id. 321; Steel v. Steel, 12 Penn. St. 64; Yaw v. Kerr, 47 id. 333; Agnew v. Fetterman, 4 id. 56; Forney v. Benedict, 5 id. 225.

³ Danforth v. Culver, 11 Johns. (N. Y.) 146.

⁴ In Bateman v. Pindar, 3 Q. B. 574, a part payment made after the action was brought was held inoperative to remove the statute bar; and this doctrine is a necessary sequence of the theory that an acknowledgment or new promise creates a new cause of action.

⁵ Carr v. Robinson, 8 Bush (Ky.), 269.

⁶ Lonsdale v. Brown, 4 Wash. (U. S.) 149; Little v. Blunt, 9 Pick. (Mass.) 488.

⁷ Lord v. Shaler, 3 Conn. 181; Dean v. Hewitt, 5 Wend. (N. Y.) 257; Pinkerton v. Bailey, 8 id. 600; Irving v. Veitch, 8 M. & W. 90.

⁸ In Irving v. Veitch, *ante*, this question was fully discussed, and decided according to the statement in the text. In that case the defendant was indebted to the plaintiffs in a balance of £2,245, for which they held his overdue promissory note. In 1827, the plaintiff and defendant agreed that the defendant should pay the balance as follows: £245 in cash, and the remainder by annual payments of £300 a year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiff should hold his promissory note as a security for the payment of the account. The £245 was paid, and the £300 was also duly paid in 1828 and 1829, but the defendant made default in payment of it in September, 1830. It was held that the plaintiffs were entitled, at any time within

by him, the creditor is remitted to his original remedy and to a plea of

six years from September, 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated. It was contended by the defendant, among other things, upon the authority of *Tanner v. Smart*, 6 B. & C. 603, and *Haydon v. Williams*, 7 Bing. 163, that, as the plaintiff sought to repel the statute by a conditional promise, he should have declared on the new promise. But the court in effect held that, unless at the time when the new agreement was entered into, it was understood and intended by the parties to be a substitute for the old debt, its only effect was to keep the old debt on foot, the new promise being merely collateral thereto. LORD ABINGER, C. B., in passing upon this question, said: "The question is, whether or no when a party has a debt for which he has a right to bring an action on account of such re-engagement as is proved here, when that engagement is broken by the party who makes it, that breach remits the creditor to his original right to sue in the same way as he originally might have sued. If that had been an original question in this case, if there had been no current of authorities on the subject, and the case had been *res integra*, it might have been a good ground for discussion whether the statute had barred the remedy on the original promise; if so, then this action ought to have been on the new promise. But I think that has been settled, and soon after the statute passed; and if anybody will take the trouble to look at Sir William Jones's Reports, and to the Modern Reports, and other reports which were published about the time of Charles II., and in the reign of William III., he will find that very point discussed and settled, — whether rightly or wrongly we are not now about to inquire, — that the party is remitted to his original form of declaration. The first case which arose on the statute of limitations was in the Court of Chancery; it was more common in those days for matters of account to be taken there, and the Chancellor was in the habit of referring to the judges of the common-law courts as to what was their construction of the statute; but it was the practice

for the defendant to plead the whole statute, and set it forth; and the plaintiff, if he relied upon the new promise, specially replied to it. According to the modern mode of pleading, the plaintiff takes issue on a general plea of the statute, and gives the matter in evidence, and it is not pleaded to by a replication: but the question arose very early, whether or not, where upon the face of the declaration the contract appeared to be out of time, the defendant might demur; and the court decided he could not. The principle upon which they decided that an acknowledgment of the debt gave the party a new right was, that where a man was indebted to another for an originally good consideration, and the statute of limitations barred the remedy when six years had elapsed, yet if there was a good consideration for a new promise *in foro conscientiae*, — an equitable and conscientious consideration, that made the promise binding; the result of which might have been, as I said before, to oblige the plaintiff to declare upon the new promise; but the court held that was not necessary. I will now refer to a more modern case, which came before the court on a writ of error, *Gould v. Johnson*, 2 Ld. Raym. 838: that was an action upon a bill of exchange, where upon the face of it the time had elapsed some years, and there was a promise stated to have been made in writing several years before; and upon the writ of error the objection was taken that the count could not be maintained: but the answer was, that it was not necessary for the party suing to set forth anything but the original right of action as it stood; and two reasons were given by the judges: one was, that the other party might reply that the writ was issued so as to keep the cause of action alive, and within the six years; and the other was, that he might reply generally. There is also a case of *Leaper v. Tatton*, 16 East, 420, in which this very question arose in the Court of King's Bench. That was *assumpsit* on a bill of exchange, and also upon an account stated; the bill was payable above six years before the action was brought; it was contended at the trial that the promise to pay within the six years

the statute thereto, and he must reply the new promise ; and if, upon the

took it out of the statute. LORD ELLENBOROUGH having directed a verdict to be found for the plaintiff, a motion was afterwards made, and that very objection was taken, that the declaration ought to have been upon the new promise. LORD ELLENBOROUGH had a very considerable knowledge of the forms of pleading ; and his answer was, that if this was the right form of declaration that was insisted upon, it was enough to say it had never been in use, but that it was the common practice to declare on the original contract. It is said, however, that this doctrine does not apply to this count on an account stated. I see no reason for that ; the account stated is nothing more than the admission of a balance due from one party to another ; and that balance being due, there is a debt ; and when a man is indebted, there is always a good consideration for his promise. The very statement of the account, and admission of the balance, implies a promise in law to pay it. If at the time that is done another engagement is made, which binds the party to pay the difference in a certain course of payment, which prevents the party from bringing the action until a certain period has elapsed, what is the result ? Why, if the debtor does not perform that engagement, the creditor is remitted to his original right ; and we ought to presume a promise to pay at the time because the defendant is indebted, which forms a good consideration for the promise ; but the promise could not exist during the running of the conditional contract, because it was an open contract, and he was capable of performing it. Therefore, I see no difficulty at all in supporting the plaintiff's right to sue upon the original contract, the moment the new contract was broken by the non-payment of the instalment due in the year 1830. This doctrine is also held in other cases, as well as in relation to bills of exchange. One is the case of *Wittersheim v. The Countess Dowager of Carlisle*, 1 H. Bl. 631, where it appeared that the plaintiff had taken a bill of exchange as a security for money to be paid in a certain time, and he did not bring his action until after the six years had elapsed from the time he lent the

money. The court held, that though on a mere loan of money the time of limitation might commence from the date of the loan, yet where the money was lent on a special contract for repayment, it was the time of the repayment that ought to fix the period of the limitation. So I say here, the right of action only accrued from the time the contract made in 1827 was broken by the defendant ; and that being within the six years, the plaintiffs are entitled to sue ; but if any doubt could exist, — I own none exists in my mind, — the account stated is the same in principle as goods sold and delivered ; but if that fails, what shall be said of the promissory notes ? It is expressly a part of the bargain that the promissory notes shall stand as a security for the performance of the contract, — for the payment of the money agreed upon to be paid by instalments. Is that part of the contract inoperative and ineffective, and to go for nothing ? What is the meaning of it, but that the plaintiffs shall be at liberty to sue on the notes, if the defendant does not comply with the contract ? Can they sue on the promissory notes in the mean time ? Certainly not ; but they might have brought their action the very day after the defendant failed to perform the contract, by paying the instalment of £300 a year ; that was within the six years from the time the action is brought, and that is to be taken as the time when the action accrued. On these grounds, it seems clear to me that the payment of the instalment under the contract having failed, and a breach having taken place in the performance of it, this remitted the plaintiffs to their original right to bring an action, either on the account stated or upon the promissory notes, at the time when the breach was committed."

PARKE, B., said : " I am of the same opinion in this case, that the rule should be discharged, on the third ground upon which the case was sought to be taken out of the statute of limitations : that ground is, that there was an agreement between the parties in the year 1827 which constituted a new and binding agreement between them distinct from the original debt ;

plaintiff's part, there is no fault as to the failure of the conditions, the new

and the doubt I have had during the course of the argument was, only whether or not it was necessary to declare upon that agreement, or whether the plaintiffs could recover upon either count of this declaration. Now it is clear to my mind, that unless this was a binding and valid agreement between the parties, giving the plaintiffs a new remedy for a new consideration, the transaction in 1827 would not have taken the case out of the statute of limitations. It is essential, in order to take the case out of the statute of limitations, that there should be a new and binding agreement between the parties, and a new consideration to pay the debt by instalments, and upon failure in payment of those instalments, to pay the other original debt; and although MR. KELLY succeeded in raising a doubt in my mind whether there was any fund provided by means of the assignment of the consular salary, so as to constitute a new engagement, though I have a doubt whether there is such a binding engagement, I have no doubt whatever that there was a sufficient consideration in Cock's accepting the bill of exchange on behalf of the defendant, as the price of the plaintiffs' giving time upon the original promissory notes. There can be, I conceive, no doubt on this part of the case that Mr. Cock having become liable to pay the amount of his acceptance, in consideration of the plaintiffs' giving time to Veitch upon the promissory notes until any failure should take place in the payment of the salary, that is a new and binding engagement between the parties; and there is no doubt the declaration could have been so framed upon the new agreement; and there would have been no breach of that agreement until the month of September, 1830, when the first failure took place in the payment of the consular salary. The question then is, whether the declaration as it stands at present is not sufficient, and whether the case cannot be taken out of the statute, upon this declaration, by means of the new engagement; and, after having entertained some doubt, I think it is taken out of the statute, and the count upon the promissory note may in this case

be sufficient. On looking to the terms of the agreement, it appears to me that it amounts to an agreement on the part of the defendant to pay by instalments, and, provided the instalments are not duly paid, to pay the original debt: it is, therefore, a promise, in certain events, to pay the original debt itself, and those events have occurred by which the original debt has become payable, because the instalments have not been duly paid, there having been a non-payment of the last instalment in September, 1830; therefore, the conditional promise to pay the original debt becomes absolute, and the defendant becomes indebted upon the promissory notes; and then, I take it, we may apply to this case the principles laid down by the court in the case of *Stone v. Rogers*, 2 M. & W. 443, that those events having happened which have made the defendant a simple debtor by virtue of his new promise, he may be declared against as being indebted upon the promissory notes; and it is upon that ground, it seems to me, that the counts upon the promissory notes may be sustained.

"With respect to the count upon the account stated, I do not mean to intimate any difference of opinion with my Lord Chief Baron on the subject; but I must own I feel some doubt whether, from the peculiar form of it, there has been that species of accounting which the count charges; and therefore I would rather found my judgment upon the counts on the promissory notes, because I am quite satisfied as to that ground, and feel some doubt upon the account stated. Feeling that the courts have not intended that there should be any difference in its import from the old account stated, and that being apparently an account stated of a debt then due and payable upon the notes, I feel some little doubt upon that; but as to the counts on the promissory notes, I think there is abundant evidence of a promise to pay the notes, and the defendant is a simple debtor for that amount; and I do not understand that there is any case which is at variance with that conclusion. The two cases of *Tanner v. Smart* and *Haydon v. Williams* were cited by MR.

promise becomes an absolute one upon the old debt.¹ If the condition

TOMLINSON as being authorities to show that if the promise was conditional, as it was in this case, it ought to be declared upon as such; but I find nothing in those decisions to affect my opinion upon this part of the case. According to the facts of this case the conditions have been performed, so that the debt upon the promissory notes is absolute, and may be declared upon in the ordinary form.

"In *Tanner v. Smart*, 6 B. & C. 609, LORD TENTERDEN, in giving judgment, says: 'The promise proved here was, "I'll pay as soon as I can," and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise, into one that was absolute and unqualified.' The whole of that decision is this, that when a man acknowledges a debt, and makes a qualified promise to pay it, you are to take it altogether, — you are not to consider as an absolute promise that which he makes only on a condition. Then the plaintiff cannot recover against him unless he can show that the condition is fulfilled, by proving the defendant's ability to pay in such case; there is nothing which intimates that he may not declare generally on the subsequent promise. When the condition is fulfilled the defendant becomes simply liable. So, in the case of *Haydon v. Williams*, I find the Court of Common Pleas expressly guarding against their giving an opinion that the plaintiff could not have recovered, in case he should have shown that the defendant was liable to pay. The court says: 'The promise here is guarded with a condition; . . . and it is sufficient to say there is no proof of the defendant's ability so as to satisfy the condition, and make the conditional promise an absolute one.' The courts, therefore, do not mean to intimate that, the condition being performed, so as to make the promise an absolute one, the plaintiff could not have declared in the ordinary way. There are cases in which this point has occurred, in which the plaintiff has been permitted to recover

upon a declaration in the ordinary form, without stating any conditional promise. One of these cases is *Thompson v. Osborne*, 2 Stark. N. P. C. 98, id. 3, and another is *Davies v. Smith*, 4 Esp. 36, where LORD KENYON intimates that, in order to proceed upon such a promise, the plaintiff must prove that the defendant was of ability, and may then recover upon a declaration stating an absolute promise to pay. On these grounds it seems to me that the plaintiffs are entitled to recover. I think there was a binding engagement between the parties, and a promise on the part of the defendant for a new consideration in the event of the instalments not being paid. That promise became absolute in the month of September, 1830; that is, within the six years that would sustain the promise in the declaration, and that we must take as being a promise to pay according to the tenor and effect of the notes."

ALDERSON, B., also said: "I am entirely of the same opinion. It seems to me that there was a contract for a new consideration in 1827, which was not fulfilled in the year 1830, when the instalments ceased to be paid; then there was nothing more remaining of the contract but the simple duty of paying the promissory notes. On the part of Mr. Veitch, all we know is, that there has been an agreement, and he had nothing more to do than to perform his part of it, which was to pay the promissory notes then in existence; and it is not only a contract within the six years, but a contract within the six years properly stated upon the record. Then the statute of limitations is no answer to a breach of the contract so properly stated upon the record. Upon these grounds I concur entirely in the judgment of the court."

GURNEY, B., in concurrence, said: "In 1827, the defendant, who was residing abroad, being indebted to the plaintiffs, in order to gain time, engages to do certain things. In the first place, he engages to set apart a portion of his consular salary;

¹ *Stone v. Rogers*, 2 M. & W. 443; *Thompson v. Osborne*, 2 Starkie, 98; *Davies v. Smith*, 4 Esp. 36.

is one which does not depend upon the act of either party, as if there is "a promise to pay when able," the plaintiff under his replication is simply put to his proof that the defendant was, at the time of action brought, of sufficient ability.¹ But if the condition is one which is dependent upon the action of the defendant, as if he promises to pay a certain sum each year, for a certain number of years, it is only incumbent upon the plaintiff to show that the instalments were not paid, as agreed.²

In Ohio, it has been held that neither an acknowledgment, new promise, nor part payment after the debt is barred will revive it.³ Whether this ruling was justified by the language of the statute may be doubted, but the doctrine is supported by the dicta of several cases in other States; but the rule itself seems to have no foundation in principle, and is contrary to the actual doctrine of all the authorities outside of that State, from the time when these statutes were first adopted down to the present time. Indeed, it has been doubted whether an acknowledgment made before the statute has run upon a debt is supported by a sufficient consideration to render it operative to suspend the running of the statute.⁴ But this doubt was only short-lived, and it is well settled, as previously stated, that a promise to pay, made either before or after the debt is barred, will suspend or remove the statute bar.⁵ The new promise or acknowledgment must be shown to have been made upon a week-day, as in all those States where the statute renders contracts made upon the Sabbath void, such an acknowledgment or promise made upon Sunday would be wholly inoperative.⁶

in the next place, he apportions the proceeds of certain wines then in India; and, in the third place, Mr. Cock is to give his acceptance for £245. The plaintiffs were willing, on these conditions, to abstain from exercising their right of suing; but they stipulate that in case of his failing in these conditions they shall be remitted to their original right. That failure did take place three years after, in the September of 1830, by the non-payment of the third instalment of £300, and then the plaintiffs were put in the same situation as they were on the 1st of October, 1827. It follows upon this that the action is brought in due time."

In this case, it will be observed that the new promise was made before the statute had run; but the court, in treating the question, plainly intimate that there is no real distinction in this respect, except that the party may or may not, at his election, declare upon the new promise.

¹ LORD KENYON, in *Davies v. Smith*, *ante*.

² *Irving v. Veitch*, *ante*.

³ *Hill v. Henry*, 17 Ohio, 9

⁴ *Farley v. Kustenbader*, 3 Penn. St. 418; *Case v. Cushman*, 1 id. 241; *Morgan v. Walton*, 4 id. 321.

⁵ *Hazlebacker v. Reeves*, 9 Penn. St. 258; *Forney v. Benedict*, 5 id. 225; *Patton v. Hassenger*, 69 id. 311; *Wetham's Estate*, 6 Phila. (Penn.) 161.

⁶ *Haydock v. Tracy*, 3 W. & S. (Penn.) 507; *Clapp v. Hale*, 112 Mass. 368. But in Maryland, an acknowledgment made on Sunday is sufficient, *Thomas v. Hunter*, 29 Md. 406; and in Connecticut, in *Beardley v. Hall*, 36 Conn. 275, while the general doctrine that an acknowledgment of a debt made on Sunday would be inoperative was not denied, yet it was held that evidence that the defendant admitted upon Sunday that a sum of money by him previously paid to the plaintiff was to be

applied upon the note in suit was admissible. "The acknowledgment," said PARK, J., "did not apply the money to the note; it merely furnished evidence that it had been applied. Neither did the admission itself tend to remove the bar of the statute. The bar had, in fact, been removed by the partial payment of the note,

and the offer was simply to prove it by the partial payment of the note, and the effect, we think, was simply to prove it by the acknowledgment. We think the mere telling of the truth upon the Sabbath day in relation to a matter like this is not transacting secular business within the meaning of the statute."

CHAPTER VIII.

ACKNOWLEDGMENTS IN WRITING.

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| <p>SEC. 82. Lord Tenterden's Act.
 83. Similar Statutes in this Country.
 84. Effect of Statutes requiring a Writing.
 85. Sufficiency of. Instances.
 86. Acknowledgment must clearly refer to the Particular Debt.
 87. Distinction between Absolute and Qualified Promises, &c. Illustrations.
 88. Promise, &c., must be definite. Amount need not be stated.</p> | <p>SEC. 89. Instances of Sufficient Acknowledgments.
 90. Direction in a Will, to pay Debts.
 91. Debts due from Corporations.
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 94. Must be signed by the Debtor.
 95. Promise must bind the Debtor personally. Conditions, Effect of.</p> |
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SEC. 82. Lord Tenterden's Act.—In England, the great laxity that existed in reference to the removal of the statute bar by parol acknowledgments, and the strong tendency on the part of the court to relieve parties from the effect of the statutes upon the slightest proof, as well as the great temptation to perjury afforded by the rules established by the courts, aroused a strong public sentiment, especially in the minds of the leading lawyers of the country, to the necessity of some change in the statute as to the methods of proof of acknowledgments; and in May, 1828, the statute of 9 Geo. IV. c. 14, commonly called **LORD TENTERDEN'S ACT** (he being the author of the statute), was passed, and went into effect Jan. 1, 1829. This statute makes a writing necessary to an effectual acknowledgment in cases under the statute of James and the kindred Irish act. Notwithstanding that the act contains a recital that various questions have arisen as to the proof and effect of acknowledgments, it has been decided that, practically, the act is to be construed as altering the mode of proof only, not the legal construction of acknowledgments or promises.¹

¹ **TINDAL**, C. J., in *Haydon v. Williams*, 7 Bing. 163, said: "To inquire whether, in a given case, the written document amounts to a written promise or acknowledgment is no other inquiry than whether the same words, if proved, before the statute, to have been spoken by the defendant would have had a similar operation and effect." The object of the statute

was and is simply to prevent fraud and perjury in proving the acknowledgment or promise, by requiring proof thereof, about which there can be no question, *Dickinson v. Hatfield*, 5 C. & P. 46, and to do away with the absurdity which had surrounded other cases arising upon loose, indefinite, and unguarded verbal admissions. **SHAW**, C. J., in *Sigourney v. Drury*,

The act enacts as follows: "1. That in actions of debt or upon the case grounded upon any simple contract no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect, or by reason only, of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

"2. And be it further enacted, that if any defendant or defendants in any action or any simple contract shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the said trial that the action could not by reason of the said recited acts or this act, or either of them, be maintained against the other person or persons named in such plea or any of them, the issue joined on such plea shall be found against the party pleading the same.

"3. And be it further enacted, that no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange, or any other writing by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said statutes.

"4. And be it further enacted, that the said recited acts or this act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

14 Pick. (Mass.) 399. See also remarks of THOMPSON, J., in *Moore v. Bank of Columbia*, in which he speaks in high praise

of the progressive step taken by the British Parliament in the enactment of this statute, and the good results likely to ensue from it.

The main portion of this statute is given here for convenience sake, and because in those States of this country in which written acknowledgments are required the provisions are substantially the same as in this statute; and while the decisions of the English courts under this statute are not controlling authorities in questions arising under our statutes, yet they are always respected by our courts, and their doctrines are generally adopted in the decision of similar questions, so that it becomes important that the provisions of this statute should be before us, that we may see how far the decisions of the English courts upon questions arising under it are applicable in questions arising under ours.

SEC. 83. Similar Statutes in this Country.—Similar statutes have been adopted in nearly all of the States of this country. In Vermont, Massachusetts, Michigan, Oregon, Minnesota, Nevada, and California, and the other States, the provisions are substantially the same; that is, that no acknowledgment or promise shall be sufficient unless it "be made or contained by or in some writing signed by the party chargeable thereby," and also embodying the other provisions as to abatement, indorsements, and set-off. In Maine, the provision is the same, except that after the words "acknowledgment" or "promise" the words, "be an express one," &c., are inserted, thus excluding an implied promise. All these statutes require that the acknowledgment or promise shall be signed by the person chargeable, and thus put it out of the power of the debtor to act in this respect by an agent. In Arkansas, the provision is that "no verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on simple contract," but does not restrict it to a writing signed by the debtor himself; and a similar provision exists in Nebraska; and under these statutes an acknowledgment by an agent is sufficient. In all these statutes there is a provision that saves the effect of a part payment upon the statute bar. It will be observed that in those States where written evidence of an acknowledgment is required the provisions are practically the same as those in the Stat. 9 Geo. IV. c. 14. In all of them except Nevada the effect of a part payment is left the same as before the adoption of the provision as to written acknowledgments; but in that State there is no saving clause in this respect, and a part payment, unless evidenced by a writing under the hand of the party to be charged, is not admissible.¹ In New Hampshire, Connecticut, Rhode Island, Colorado, Delaware, Florida, Kentucky, Pennsylvania, Maryland, and Tennessee, no provision exists requiring an acknowledgment or new promise to be in writing.

SEC. 84. Effect of Statutes requiring a Writing.—The effect of the provision in the various statutes requiring an acknowledgment or promise to be in writing, in order to remove the bar of the statute,

¹ Wilcox v. Williams, 5 Nev. 206.

simply renders a writing necessary as a means of proof, and does not effect any alteration in the legal construction to be put upon such acknowledgments or promises. In the language of TINDAL, C. J.,¹ they “merely require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable for the insecure and precarious testimony to be derived from the memory of witnesses. To inquire, therefore, whether in a given case the written document amounts to an acknowledgment or promise, is no other inquiry than whether the same words, if proved, before the statute was enacted, to have been spoken by the defendant, would have had a similar operation and effect.”² It appears also that the words “promise” or “acknowledgment” in the statute mean the same thing.³ The terms of a lost acknowledgment in writing may be proved and the acknowledgment supported by parol evidence.⁴

SEC. 85. *Sufficiency of. Instances.* — Under these statutes any writing, signed by a defendant, admitting that a debt is due and unpaid, whether under a bond, deed, or simple contract, will revive the remedy upon the contract or obligation, although there is not upon its face any express promise to pay it;⁵ but there must be upon the

¹ Haydon v. Williams, 7 Bing. 16.

² POLLOCK, C. B., Godwin v. Culley, 4 H. & N. 373. See Moore v. Columbia Bank, 6 Pet. (U. S.) 86, and remarks of SHAW, C. J., Sigourney v. Drury, 14 Pick. (Mass.) 389; Dickinson v. Hatfield, 5 C. & P. 46. Where the statute requires that an acknowledgment or new promise shall be in writing, a verbal acknowledgment of the correctness of an account, although it may have the effect of making it an account stated, will not be sufficient to suspend or repeal the statute. Floyd v. Pearce, 57 Miss. 140. And in Mississippi even a written promise to pay part of a debt, without any promise to pay the balance, as “I am going to Aberdeen to-morrow and will send fifty dollars, which is all I can spare at present,” is held not a sufficient acknowledgment of the debt to take it out of the statute. Eckford v. Evans, 56 Miss. 18. And in that State it is also held that from the mere fact of part payment the jury are not authorized to infer a promise to pay the rest. Smith v. Westmoreland, 12 S. & M. (Miss.) 663; Davidson v. Harrison, 38 Miss. 41. And in no case can a part payment that is enforced by law be treated as sufficient to remove the statute bar. Davies v. Edwards, 15 Jur. 1044. But in Fiske v. Hibbard, 45 N. Y. Superior Ct. 831, a letter from a debtor to a creditor as follows: “I am aware that I owe you, for

money borrowed. As you have the figures, I wish you would, at your leisure, make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I want to act honestly towards everybody,” was held sufficient as an acknowledgment of whatever indebtedness actually existed at the time it was made.

³ Haydon v. Williams, *ante*.

⁴ POLLOCK, C. B., in Godwin v. Culley, *ante*.

⁵ Linley v. Bonsor, 2 Bing. N. C. 241.

In Manchester v. Braedner, 107 N. Y. 346, it was held, that where one delivers to another an order on a third person to pay a specified sum to the payee, the natural import of the transaction is that the drawee is indebted to the drawer, and the latter is indebted to the payee in the sum specified, and that it was given to the payee as the means of paying or securing the payment of his debt.

Such an order, therefore, in the absence of evidence showing a different relation between the drawer and the payee is an acknowledgment in writing by the former of a debt within the statute of limitations, and continues the debt for a period of six years from its date.

Such an order does not import that the debt so acknowledged is only to be paid

face of the writing enough to warrant the implication of a promise to pay,¹ as if the words used are simply "I O U £275," that is sufficient, because from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, a promise to pay on request may be inferred.² If, however, there is anything on the face of the instrument to repel the inference of a promise to pay, the rule *expressum facit cessare tacitum* applies; no promise will be inferred, and the acknowledgment will not enable the plaintiff to ground an action thereupon. Any admission of a liability which stops short of an admission of a debt being due at the time of the making of the admission, will not suffice for the maintenance of an action, such as a letter saying, "Doubtless I did owe the money, but I have already paid it;"³ or, "I admit the debt, but I have got a set-off;" or, "The debt is barred by the statute of limitations."⁴ If a man admits that a signature to a bill or note, or other contract in writing, is his signature, but at the same time says it was never worth anything, and that he was never liable upon the contract, this is no admission or acknowledgment.⁵ If the defendant says, in writing, "I admit the debt," that is enough; but if he says, "I admit the debt, but I have not made up my mind to pay," or, "I owe the money, but

out of the fund against which it is drawn. To constitute an acknowledgment of a debt, such as will take it out of the statute, the writing must acknowledge an existing debt, and must contain nothing inconsistent with an intention on the part of the debtor to pay. Oral evidence, however, may be resorted to, as in other cases of written instruments, in aid of the interpretation.

¹ *Evans v. Simon*, 9 Exch. 285.

² *Smith v. Thorne*, *ante*; *Dobbs v. Humphrey*, 10 Bing. 449.

In *Mills v. Davis*, 113 N. Y. 243; 41 Hun, 415, it was held as against a promissory note, payable on demand with interest, that the statute of limitations begins to run at its date.

It seems the provision of the Code declaring that, in order to take a case out of the statute of limitations, an acknowledgment or promise to pay in writing, signed by the party to be charged, is necessary, but that this "does not alter the effect of a payment of principal or interest," does not change the nature or effect of a part payment. The old rule is recognized and continued, and the payment may be proved by oral evidence. In order to make an indorsement upon a promissory note of part payment made by the holder, without the priv-

ity of the maker, competent as evidence to meet the defence of the statute of limitations, it must appear that it was made at the time when its operation would be against the interest of the party making it; and so, at least, that it was made before the statute could have operated. But it is a question for the jury as to whether the payment was, in fact, made.

Upon a reference under the statute of a claim by an executor against the estate of a deceased person, which claim was founded upon a promissory note, the defence was the statute of limitations. The note bore indorsements of payment of interest made by the plaintiff. The plaintiff himself and two other witnesses who were entitled under the will each to one-third of whatever was collected on the note, were permitted to testify, under objection and exception, that the indorsements were made by the plaintiff during the lifetime of the plaintiff's testator. Held, that the testimony was incompetent under the statute.

³ *Bryan v. Horseman*, 5 Esp. 81; *Birk v. Guy*, 4 id. 184.

⁴ *Swan v. Sowell*, 2 B. & Ald. 761; *Boydell v. Drummond*, 2 Camp. 161.

⁵ *Rowcroft v. Lomas*, 4 M. & S. 459.

I cannot tell when or how I am to pay it," or "I do not intend, or cannot afford, to pay the debt," such an acknowledgment negatives the inference of a promise to pay, and will not consequently revive the cause of action.¹ The making and signing of a promissory note by the debtor, and tendering it to the creditor for the amount of the debt, or in lieu of another note, but which is not accepted by the creditor, is not such a promise in writing as takes the debt out of the statute;² nor, indeed, under any circumstances can any paper, executed by the debtor but not delivered to the creditor, have the effect to remove the statute bar,³ unless it is executed and used by the debtor in such a way as to show that he intended it as a recognition of the debt, upon the faith of which the creditor might rely, so as to estop him from setting up the statute;⁴ and the insertion of a debt in a schedule of debts owing by an insolvent debtor, filed and sworn to by him in proceedings in insolvency, does not operate as an acknowledgment of the debt as a subsisting liability against him so as to remove the statutory bar;⁵ and, too, the acknowledgment must be made to the creditor in person, or his agent or legal representative.

SEC. 86. Acknowledgment must clearly refer to the Particular Debt.—The acknowledgment, &c., in writing, required by these statutes, must clearly relate to the debt in suit, and must be such that a promise to pay the debt can be implied;⁶ and where a letter from the debtor was relied upon, which merely stated, "My brother says you are intending to send to me. As I do not recollect the date or the amount of the indorsements, I would thank you to send me a statement of it. I have been expecting to visit you for some time past. After hearing from you, if I should not be able to visit you soon, I will write again," it was held not sufficient, because it did not identify the note, or amount to a promise to pay it.⁷ In

¹ *Brigstocke v. Smith*, 1 Cr. & M. 485; *A'Court v. Cross*, 3 Bing. 329.

² *Smith v. Eastman*, 3 Cush. (Mass.) 355. See also *Sumner v. Sumner*, 1 Met. (Mass.) 594, where, after the debtor had made and delivered to the creditor a new note in lieu of one already barred by the statute, the creditor delivered up the note to the debtor again for the purpose of putting all the creditors *in statu quo*, it was held that the last note did not operate as a new promise in writing so as to remove the statute bar; but it was intimated by the court that the rule would be otherwise if the note had been merely delivered up to the debtor for the purpose of leaving the question of the amount open, and not the question of the debtor's indebtedness.

³ *Allen v. Walton*, 70 Mo. 138; *Edwards v. Culley*, 4 H. & N. 378; *Merriam v. Leonard*, 6 Cush. (Mass.) 151.

⁴ *Duguid v. Scholfield*, 32 Gratt. (Va.) 803.

⁵ *Richardson v. Thomas*, 13 Gray (Mass.), 381; *Roscoe v. Hale*, 7 id. 274; *Stodard v. Doane*, 7 id. 387.

⁶ *Wells v. Wilson*, 140 Penn. St. 145. A declaration of an intention to pay a debt is not equivalent to a promise to pay it, *Lowrey v. Robinson*, 141 id. 189. See also *Davis v. Noyes*, 15 N. Y. Supp. 431, *Wambold v. Hoover*, 110 Penn. St. 9.

⁷ *Gibson v. Grosvenor*, 4 Gray (Mass.), 606. In *Leigh v. Lithicum*, 30 Tex. 100, a letter as follows, "You said something about a note you have. You are apprised I have an offset, &c. When I see you we will adjust the matter, and whatever is due on the note I will pay," of itself, in the absence of any other evidence to apply it to the note in suit, was held insufficient; but the rule generally adopted is that, if

another Massachusetts case,¹ the debtor wrote the creditor as follows :

the writing is indefinite as to the debt in question, parol evidence is admissible to explain it, as any other latent ambiguity.

In *Hussey v. Kirkman*, 95 N. C. 63, the intestate admitted to a third person that he owed a note of about sixty dollars, which was just and due, and he intended to pay it if he ever got well enough. The court held this insufficient, saying : "The trouble is that no note has been produced, nor its contents shown, to which the admissions can be attached, so as to admit of identification." In *Faison v. Bowden*, 72 N. C. 405, the testator said to the plaintiff, "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump." The testator owed the plaintiff for medical services, running over a period from the beginning of 1854 to his death, in November, 1861, and the recognition of the debt was relied on to remove the bar as to the whole account. It was held to be insufficient.

The following expressions in a letter from the debtor to his creditor : — "You shall be paid as I get the money over and above my bread and meat ;" "If I get the money, I will then pay you ;" "I have acknowledged the debt to you in my letters again and again, and therefore it stands as good as if you had my bond," — have been held sufficient in view of the fact that the last expression clearly shows that the debtor did not intend to confine the creditor to the source indicated in the first expressions for payment, but intended his language to convey an unqualified acknowledgment of the debt, from which an unqualified promise to pay is fairly inferred. *Abraham v. Swann*, 18 W. Va. 274, 41 Am. Rep. 692.

A statement of a debtor that he "will try to do a portion of it" will not remove the statute bar. *Denny v. Marrett*, 29 Minn. 361. A declaration of an *intention* to pay, is not equivalent to a promise to pay. *Lowrey v. Robinson*, 141 Penn. St. 189. A clear and unambiguous acknowledgment of a debt as an existing obligation, consistent with a promise to pay, will remove the statute bar, *Wells v. Wilson*, 140 Penn. St. 645; *Russ v. Cunningham*,

16 S. A. (Tex.) 446; *Woodlief v. Bragg*, 108 N. C. 571; but such acknowledgments must be clear and unequivocal. *Union National Bank v. Evans*, 43 La. An. 372, and consistent with a promise to pay it in all events. *In re Perry's Est.* 15 N. Y. Supp. 535; *Smith v. Camp*, 58 Hun (N. Y.), 434; *Stout v. Marshall*, 75 Iowa, 498; *Royster v. Granville Co.*, 98 N. C. 148; *Gathright v. Wheat*, 70 Tex. 740; *Lange v. Caruthers*, 70 Tex. 718; *Holberg v. Jaffrey*, 65 Miss. 526; *Ashby v. Washburn*, 23 Neb. 571; *Childs v. Powell*, 91 Mo. 622; *Croman v. Stull*, 119 Penn. St. 119; *Hostetter v. Hallinger*, 117 Penn. St. 606, and where this condition exists the statute bar is removed. *Morgan v. Ramlands*, L. R. 7 Q. B. 493; *Holt v. Gage*, 60 N. H. 536; *Green v. Coos, & Co.*, 23 Fed. Rep. 67; *Schaeffer v. Hoffman*, 113 Penn. St. 1; *Shepherd v. Thompson*, 122 U. S. 231; *Mitchell's Case*, L. R. 6 Ch. 822; *Foster v. Smith*, 52 Conn. 440; *Ralfe v. Pillaud*, 16 Neb. 21; *Devereaux v. Henry*, 16 id. 55; *Black v. Reynold*, 3 Harr. (Del.) 528; *Stewart v. Garrett*, 65 Md. 392; *Mastin v. Branham*, 86 Mo. 642; *Stansbury v. Stansbury*, 20 W. Va. 23; *Webster v. Newbold*, 41 Penn. St. 482; *Switzer v. Noffinger*, 82 Va. 518; *Yost v. Grim*, 116 Penn. St. 527; *Weston v. Hodgkins*, 136 Mass. 326; *Pierce v. Seymour*, 49 Wis. 94; *Lawson v. McCortney*, 104 Penn. St. 356.

¹ *Bailey v. Crane*, 21 Pick. (Mass.) 323. In a recent Alabama case, *Chapman v. Barnes*, 93 Ala. 433, it was held that an acknowledgment contained in a letter which does not mention the amount of the debt, and merely tells the creditor "if he needs more" to call for it, and he shall have it, does not constitute such a promise as will remove the bar of the statute; and a promise shown by a letter which, while it mentions the amount of the debt specifically, merely states that the debtor expects to pay in a year, or proposes to turn over property to satisfy the debt, was held insufficient to remove the statutory bar. The letter was held to be lacking in the essentials of an unconditional promise to pay necessary to the removal of the statutory bar already perfect, because it failed to state the amount of indebtedness, and

"Next week I shall be able to send in to C. T. a statement of my affairs. He will show you the whole of my property, and ask for a discharge. I should have done this before, but have been obliged to work for my board. I have large demands, &c., but I cannot collect them, and think I never shall;" and it was held not sufficient to take the debt out of the statute.¹ A letter in which the debtor stated, "I feel ashamed of it standing so long," was held insufficient.² The constant replication ever since the statute to let in evidence of an acknowledgment is that the cause of action accrued or that the defendant made the promise in the declaration mentioned within the six years; and the only principle upon which it can be held to be an answer to the statute is, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promise which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, though it may show clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails.³ The replication in those States where

to set forth a promise to pay any sum certain. Its assurance to the creditor that "if you need or want more call for it without hesitation, and you shall have it," not stating the amount due or how much "more" would be paid on demand, does not operate as such promise as will take any sum from under the ban of the statute. "There must be a clear and definite acknowledgment of the debt, a specification of the amount due or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay." *Miller v. Basehore*, 88 Penn. St. 356; *Landis v. Roth*, 109 id. 621. *McClellan, J.*, said: "This leaves for consideration, on the question whether the bar of the statute was removed by a written promise of defendant, the letters of October 15, 1882, and September 23, 1883, to Mrs. and Mr. Watrous, respectively. They are certainly not wanting in acknowledgments of the indebtedness, and are, it may be admitted, sufficiently specific as to the amount thereof. They express a desire and expectation to pay it. They evince a purpose and willingness to pay it after a time. They contain propositions looking to a settlement of it, at one time, by the conveyance of certain landed interests to the heirs of the intestate, and, at another, through the satisfaction of a claim which had been or would be asserted

against the estate. But neither of these letters can be construed into an unconditional promise to pay the debt, nor into an acknowledgment of its existence, accompanied with an unequivocal expression of a willingness to presently pay it, from which in many jurisdictions at least, the unconditional promise required by statute might be implied. The letters do not import the written absolute undertaking to pay the debt required to a removal of the bar of the statute. *Scott v. Ware*, 64 Ala. 174; *Minniece v. Jeter*, 65 id. 222; *Grimball v. Mastin*, 77 id. 553."

¹ In *Hanney v. Tobey*, 15 Pick. (Mass.) 99, the debtor, some time after the note in suit had become due, executed an indenture between himself and his creditors, by which he assigned his property in trust for such of his creditors as should become parties to the indenture, and the creditors covenanted to discharge him from all claim or demand, action or right of action, for the space of seven years, upon receiving their respective portions of the property. The plaintiff executed the indenture. It was held that the indenture did not suspend the statute or keep the debt on foot. See also, to same effect, *Smith v. Eastman*, *ante*.

² *Wilcox v. Williams*, 5 Nev. 206.

³ *Tanner v. Smart*, 6 B. & C. 606.

a written acknowledgment is required must now specify that the acknowledgment was in writing, signed by the debtor.¹

SEC. 87. Distinction between Absolute and Qualified Promises, &c. Illustrations. — When the plaintiff's declaration, as is usually the case, is framed on the original absolute promise to pay on request, any writing signed by the party within six years of the commencement of the action, showing an express or implied absolute promise to pay the debt, or satisfy the claim, will suffice to sustain the action.² But when the defendant's promise to pay is qualified and conditional, the condition must be shown to be accomplished, and the promise to have become absolute, so as to support the absolute promise laid in the declaration.³ The amount of the debt may be shown by parol, and need not appear upon the face of the writing;⁴ and if the defendant admits the debt, but objects to the amount claimed, the law will infer from the admission a promise to pay what, upon investigation, shall appear to be due; and the admission, consequently, will give rise to a cause of action, and be a bar to the statute.⁵ The following letters and writings have been held not to be sufficient to bar the statute: "I am in daily expectation of being enabled to give a satisfactory reply respecting the demand of Messrs. Morrell against me."⁶ "I will see Davis; I have no doubt he has paid it; if by chance he has not paid it, it is very fit it should be."⁷ "I have now a hope that before a week I shall have it in my power to pay a portion of the debt, when we shall settle about the liquidation of the balance."⁸ "Plaintiff's claim, with that of others, shall receive the attention that, as an honorable man, I consider them to deserve; it is my intention to pay them, but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive."⁹ "I give the above accounts to you, so you must collect them, and pay yourself, and you and I will then be clear."¹⁰ "I have hitherto deferred writing to you regarding your demand upon me in consequence of some family arrangements, through which I should be enabled to discharge your account. I have now the satisfaction to inform you that an appointment of sufficient funds has been made, for the purpose of which H. Y. is one of the trustees, to whom I have given in a statement of your account, amounting to £98 8s. Some time must elapse before the trustees can be in cash to make these payments, but I have Mr. Wy's authority to refer you to him for

¹ Forsyth v. Bristowe, 8 Exch. 347.

² Leaper v. Tatton, 16 East, 420; Up-ton v. Else, 12 Moore, 304.

³ PARKE, B., Humphreys v. Jones, 14 M. & W. 3; Waters v. Earl of Thanet, 2 Q. B. 759; Edmunds v. Downes, 2 Cr. & M. 459; Haydon v. Williams, 7 Bing. 167; Irving v. Veitch, 3 M. & W. 112.

⁴ Williams v. Griffith, 3 Exch. 343, and the identity of the debt may be shown by parol, Abrahams v. Swann, 18 W. Va. 274.

⁵ Gardner v. M'Mahon, 3 Q. B. 568; Cheslyn v. Dalby, 4 Y. & C. 238.

⁶ Morrell v. Frith, 3 M. & W. 403.

⁷ Poynder v. Bluck, 5 Dowl. P. C. 570.

⁸ Hart v. Prendergast, 14 M. & W. 741. But see Edmonds v. Goater, 21 Law J. Ch. 290.

⁹ Fearn v. Lewis, 6 Bing. 349.

¹⁰ Routledge v. Ramsay, 8 Ad. & El. 221.

any further information.”¹ “Bring the bill; I shall be at your service.” “Send me your account. If it is just, I will settle it.”² “I hereby charge my reversionary interest, when the same shall fall into possession and be rendered available to my use, with the payment of £108 8s. 9d. to Mr. Martin, to carry lawful interest.”³ “I am much surprised at receiving a letter this morning for the recovery of your debt. I candidly tell you, once for all, I shall never be able to pay you in cash, but you may have any of the goods we have at the Pantehnicon by paying the expenses incurred thereon.”⁴ An agreement in writing, which does not acknowledge a debt, or contain a promise to pay the same, except upon failure to produce a certain receipt, and which expresses no consideration, has been held insufficient to remove the statutory bar.⁵ The rule in all cases being that, where a promise is conditional, there can be no recovery unless the condition is fulfilled, or there is a new and sufficient consideration for the promise;⁶ and in a case of this character no promise can be implied, because there is an express denial of liability, and the debtor would certainly be entitled to the whole statutory period in which to produce his receipt.

SEC. 88. Promise, &c., must be definite. Amount need not be stated.—In a Georgia case,⁷ in order to establish a suspension of the statute, the plaintiff introduced a letter from the defendant as follows: “Gentlemen,—In reply to your favor of the 22d instant, you will please to withdraw your draft of \$314.37 on me, as I cannot pay for the present. As soon as I have the money, I shall remit;” and it was held too indefinite to avoid the statutory bar as against the account, or to sustain an action. And, generally, in the case of written acknowledgments, as in parol, of which numerous illustrations have already been given, the new promise must be direct and positive; and if it is dependent upon an acknowledgment, the acknowledgment must be unqualified, of a subsisting debt, which the debtor is liable and willing to pay.⁸ The exact amount of the indebtedness need not be stated. If the debt is identified, the amount may be left open for future adjustment, or may be proved by parol.⁹ The mere mention of

¹ *Whippey v. Hillary*, 3 B. & Ad. 400.

² *Spong v. Wright*, 9 M. & W. 629.

³ *Martin v. Knowles*, 1 N. & M. 422.

⁴ *Cawley v. Furnell*, 20 Law J. C. P. 197.

⁵ *Aldrete v. Demitt*, 32 Tex. 575.

⁶ *Price v. Price*, 34 Iowa, 404.

⁷ *Sedgwick v. Gerding*, 55 Ga. 264.

⁸ *Senseman v. Hershman*, 82 Penn. St. 83; *Otterback v. Brown*, 2 McArthur (U. S. C. C.), 541; *Miller v. Baschore*,

83 Penn. St. 356. It must be made to the party seeking its benefit, or to some one authorized to act for him, and without protest or claim of set-off. *Teesen v. Cambelin*, 1 Ill. App. 424.

⁹ *Hart v. Boyd*, 54 Miss. 547. In *Canton Female Academy v. Gilman*, 55 Miss. 148, a letter as follows, “It would suit my convenience to execute my note for the balance due for rent, payable Jan. 1, 1877,” was held too indefinite proof of an acknowledgment of the debt to take it out of the statute.

an indebtedness, without questioning it, is not sufficient;¹ nor is a mere request for delay, without stipulating any time for indulgence;² nor is the fact that one co-debtor has suffered a judgment by default upon the joint debt to be entered against him, such an acknowledgment as will remove the statute bar against his co-debtor.³

SEC. 89. Instances of Sufficient Acknowledgments. — The following acknowledgments, on the other hand, importing a promise to pay the debt or satisfy the claim, have been held sufficient acknowledgments within the statutes: "I am wretched on account of your not being paid: there is a prospect of an abundant harvest, which must reduce your account; if it does not, the concern must be broken up to meet it."⁴ "The demand is not a just one, but I am ready to settle the account . . . I am not in his debt £90; shall be happy to settle the difference."⁵ "I am ready to put it out of my power to take advantage of the limitation act, and will immediately give you my note for whatever is due to you."⁶ "Your account is quite correct, and O! that I were now going to enclose you the amount of it."⁷ If, in an account rendered, there are two perfectly distinct items, not in any way connected together, and forming no part of one continuous transaction, a signed acknowledgment as to one of them will not take the other out of the operation of the statute.⁸ Where a written acknowledgment of the debt, signed by the debtor, had been lost, oral evidence of the contents of the writing and of the making of the acknowledgment was permitted to be given, so as to take the case out of the operation of the statute.⁹

SEC. 90. Direction in a Will, to pay Debts. — A general direction by a testator in his will, that all his just debts shall be paid, is treated as applicable only to those liabilities that are enforceable by legal proceedings, consequently it is not regarded as sufficient to operate as a waiver of the defence of the statute of limitations.¹⁰ But specific directions to pay certain claims upon which the statute had run, or upon which it was running when the will was executed, would operate as a waiver of the statutory bar, which would be binding upon the executor and all others interested in the distribution of the estate to the extent and subject to the restrictions, if any, put thereon by the testator.¹¹

SEC. 91. Debts due from Corporations. — Where a debt is contracted by an officer of a corporation, as such, or a note or other obli-

¹ *Hanson v. Towle*, 19 Kan. 273.

² *Cook v. Cook*, 10 Heisk. (Tenn.) 664. But see *Bloom v. Kern*, 30 La. An. Part II. 1207, where a letter of that kind was held sufficient, not only to take the note out of the statute as to the principal, but also as to the surety.

³ *Lane v. Richardson*, 79 N. C. 159. Nor will a promise by one joint debtor remove the bar as to the other, *Campbell v. Brown*, 86 N. C. 376.

⁴ *Bird v. Gammon*, 3 Bing. N. C. 883.

⁵ *Colledge v. Horne*, 3 Bing. 119.

⁶ *Gardner v. M'Mahon*, 3 Q. B. 561.

⁷ *Dodson v. Mackey*, 8 Ad. & El. 225.

⁸ *Robarts v. Robarts*, 1 M. & P. 489; *Rothery v. Munnings*, 1 B. & Ad. 15; *Phillips v. Broadley*, 9 Q. B. 744.

⁹ *Haydon v. Williams*, 7 Bing. 163.

¹⁰ *Broxton v. Wood*, 4 Gratt. (Va.) 25; *Rush v. Fales*, 1 Phila. (Penn.) 463.

¹¹ *Broxton v. Wood*, *ante*.

gation is executed by him as such, a payment or new promise made by his successors in that office will have the effect to keep the debt on foot and save it from the operation of the statute;¹ and, if the note is so executed as to render the individuals signing it personally liable therefor, the question as to whether a payment made thereon by their successors in office was not authorized by them is for the jury. Thus, in the case last cited it appeared that the parish vestry having resolved to borrow money to build almshouses, the plaintiff's testator advanced some of the money upon the security of a promissory note executed by the defendants and others, who were parish officers, as follows:—

LLANRHOS, 1st May, 1830.

£185.—We promise to pay to David Jones or bearer, on demand, the sum of one hundred and eighty-five pounds, with interest thereon from the first day of May, 1830, at the rate of £5 per centum per annum, for value received, to build twelve almshouses at Towyn.

JOSEPH HUGHES,	} Churchwardens.	{ Or others for the time being.
E. ROBERTS,		
JOHN EVANS,	} Overseers.	
W. EVANS, ^{his} X mark.		

Witness—J. JONES.

Interest on this note had been regularly paid by the overseers for the time being up to 1847, and by them debited to the parish. The defendants had never paid any interest on the note, nor in express terms ever authorized the parish officers to pay it for them. Upon the trial before WIGHTMAN, J., at the assizes, the judge instructed the jury that the defendants were entitled to a verdict if the payment was made without their knowledge or authority. But upon a rule to set aside the verdict on the ground of misdirection, the verdict was set aside, the court holding that it was a question for the jury whether or not the defendants had not constituted the churchwardens and overseers of the parish for the time being their agents, for the purpose of paying the interest.²

SEC. 92. **Entry of Debt in Schedule, Deed, &c.**—Under these statutes, the entry of a debt in an inventory or schedule of the debtor's debts, to be filed in insolvency or in any proceeding, when the act is voluntary, is held sufficient to take the debt out of the statute, if the schedule or inventory is signed by the debtor, but not otherwise, unless it is made a part of another instrument which is signed.³ Such an entry would not be sufficient, even though sworn to, unless signed by

¹ Jones v. Hughes, 5 Exch. 104.

² Rew v. Pettet, 1 Ad. & El. 196.

³ Woodbridge v. Allen, 12 Met. (Mass.) 470. In Smith v. Poole, 12 Sim. 17, an action was brought on a note upon which no payment had been made since 1823. The action was brought in 1835, and to

save the note from the operation of the statute, it was proved that in 1832 the administrator of the maker returned, under citation, an inventory and account of the debtor's assets and liabilities, in which this note was included, and it was held sufficient.

the debtor. The recital in a mortgage that it is made subject to a prior mortgage, if made before the statute has run thereon, does not suspend the operation of the statute and start it afresh from the date of such recital;¹ but such a recital in a mortgage, made after the statute has run upon a previous mortgage, renews the prior mortgage and gives it a new period of life from the date of the mortgage in which such recital is contained.² In order to operate as a renewal of a debt upon which the statute has run, the writing in which the acknowledgment or new promise is contained must either have been delivered to the creditor or to some person acting for him, or deposited in some public office, where it can be said to have been deposited with the intent and purpose that the creditor should rely upon it to keep his debt on foot.³ The mere fact that the debtor made a written acknowledgment of the debt, or promise to pay it even, which he retained, and which was never delivered to the creditor, will not operate to repeal the statute as to such debt.⁴

SEC. 93. Sufficiency of, for the Court, except. — The question whether a written acknowledgment is sufficient to amount to an absolute promise to pay is a question for the court, and should not be submitted to the jury.⁵ Where, however, a document of doubtful construction is put in evidence to avoid the effect of the defendant's plea, and has to be explained by extrinsic facts, the question is for the jury.⁶

SEC. 94. Must be signed by the Debtor. — It is necessary, under the statutes in those States where the acknowledgment is required to be "in writing and signed by the party chargeable thereby," that the instrument relied upon as an acknowledgment should bear the actual signature of the person to be charged, and the circumstance that it is in his handwriting does not give it validity.⁷ In one case it was held

¹ *Palmer v. Butler*, 36 Iowa, 576.

² *Day v. Baldwin*, 34 Iowa, 380.

³ *Duguid v. Scholfield*, 32 Gratt. (Va.) 803.

⁴ *Smith v. Eastman*, 3 Cush. (Mass.) 355; *Hughes v. Paramore*, 35 Eng. L. & Eq. 195.

⁵ *Routledge v. Ramsay*, 8 Ad. & El. 221; *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674. Where the defendant said that it was impossible for him to pay then, but that he would call on the plaintiff in the course of two or three weeks and give him all the satisfaction he could desire, it was held that the construction and effect of this was for the court, and that there was nothing to go to the jury. *Magee v. Ma-*

gee, 10 Watts (Penn.), 172; *Berghaus v. Calhoun*, 6 id. 219.

⁶ *Morrell v. Frith*, 3 M. & W. 402; *Snook v. Mears*, 5 Price, 636.

⁷ *Bayley v. Ashton*, 12 Ad. & El. 493. In *Hyde v. Johnson*, 2 Bing. N. C. 776, the debtor's wife wrote a letter to the plaintiff in her husband's name and at his request, proposing to pay the debt by instalments; and the court held that, as the letter was signed by an agent and not by the party chargeable, it was not sufficient. "It appears," said TINDAL, C. J., "that the legislature well knew how to express the distinction between a signature by the party and a signature by his agent, and, as the act expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of

that where the debtor wrote the entire instrument, including his name, at the top, as "I, A. B.," &c., it was a sufficient signature;¹ but it is not believed that this would be regarded as sufficient under our statutes. But the omission of a date is not material, as it may be supplied by parol;² neither is it indispensable that the name of the creditor should appear in the instrument, as that,³ as well as the identity of the debt, may be supplied by parol.⁴

SEC. 95. Promise must bind the Debtor personally. Conditions, Effect of. — The words, "unless such acknowledgment or promise are made or contained by or in some writing signed by the person chargeable thereby," are held to be restricted to the personal liability of the debtor, and if he promises to pay out of a particular fund,⁵ or if he says that certain persons are owing him, and that the creditor may get the amount to apply on his debt if he can, — he does not thereby charge himself, or remove the statute bar so as to enable the creditor to recover the debt of him.⁶ In the case last referred to, the debtor wrote the plaintiff as follows: —

GENTLEMEN, — I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements, through which I should be enabled to discharge your account, and which were in progress, not having been completed.

I have now the satisfaction to inform you that an appointment of sufficient funds for this purpose has been signed, of which Henry Young, Esq., 12 Essex Street, Strand, is one of the trustees, to whom I have given in a statement of your account, amounting to £98 8s. 6d. It will, however, be unavoidable that some time must elapse before the trustees can be in cash to make these payments; but I have Mr. Young's authority to refer you to him for any further information you may deem requisite on this subject. I remain, Gentlemen, your obedient servant,

A. W. HILLARY.

LITTLEDALE, J., said: "I think this is not sufficient to take the case out of the statute of limitations; and I think that the plaintiffs ought to have gone to Mr. Young for the money."

the statute, and that we should be legislating and not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent." See also *Clarke v. Alexander*, 8 Scott N. C. 147.

¹ *Holmes v. Mackrell*, 8 C. B. N. S. 789.

² *Kincaid v. Archibald*, 73 N. Y. 183; *Edmonds v. Downes*, 2 Cr. & M. 459; *Hartley v. Wharton*, 11 Ad. & El. 934; *Lechmere v. Fletcher*, 1 C. M. & R. 623.

³ *Hartley v. Wharton*, *ante*; *Mahon v. Cooley*, 36 Iowa, 479.

⁴ In *Shortredge v. Check*, 1 Ad. & El. 57,

the defendant had written, "I will pay the promissory note," and it was held that the onus of proving the existence of more than one promissory note, to which the writing might refer, was upon the person disputing the debt. And under the rule that the identity of the debt may be shown by parol, it was held that a promissory note, though unstamped, and for that reason void, is admissible to show what was intended by the acknowledgment. *Spickernell v. Hotham, Kay*, 669.

⁵ *Routledge v. Ramsay*, 8 Ad. & El. 221.

⁶ *Whippy v. Hillary*, 5 C. & P. 207.

For the defence, Mr. Young was called. He stated that he was not in funds till about three months after the bringing of the present action ; and that as soon as he was so, he sent to the plaintiffs to offer them the sum mentioned in the letter.

After the evidence was closed, LITTLEDALE, J., said: "I am of opinion that this letter is not sufficient to take the case out of the statute. If the acknowledgment be accompanied by a condition, you must take the whole together. In this letter, the defendant refers to Mr. Young. At most it is only a promise to pay when Mr. Young is in funds." A letter in which the debtor wrote, "Though I do not deny it, I do not promise to pay it; whether I will promise, and what species of payment I will make I reserve for future consideration,"¹ has been held insufficient. So when a debtor wrote to his creditor among other things, that some other person was the principal debtor, and after urging him to press such person for payment, says, "I will try to do a portion of it, but in fact, the matter belongs to him exclusively. After you have interviewed him, please write me the result," it was held that the statute bar was not removed as to any portion of the debt.²

¹ Morrell v. Frith, *ante*.

1882, reported in note, p. 695, vol. 41,

² Denny v. Marrett, Minn. S. C. Aug. Am. Rep.

CHAPTER IX.

PART PAYMENT, ACKNOWLEDGMENT BY.

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| <p>SEC. 96. Effect of, generally.</p> <p>97. Must be made as Payment of Part of Debt.</p> <p>98. Must be Nothing to repel Inference of Admission that more is due.</p> <p>99. Payment by Representatives of Debtor.</p> <p>100. Rule in <i>Tippets v. Heane</i>.</p> <p>101. Payment must be authorized, and voluntary.</p> <p>102. Rule in <i>Linsell v. Bonsor</i>.</p> <p>103. Payment made to Agent binding, when.</p> <p>104. Principle and Requisites of an Acknowledgment by Part Payment.</p> | <p>SEC. 105. Effect of Part Payment of Principal or Interest.</p> <p>106. Rebuttal of Implication. Indeterminate Debt.</p> <p>107. Payment into Court.</p> <p>108. Identity of Debt.</p> <p>109. Questions for the Jury.</p> <p>110. General Rule as to Appropriation of Payments.</p> <p>111. Oral Proof of Part Payment.</p> <p>112. Part Payment need not be in Money.</p> <p>113. Test as to what amounts to Part Payment.</p> <p>114. Part Payment by Bill or Note.</p> <p>115. Indorsements on Notes, &c.</p> <p>116. Evidence of Part Payment.</p> |
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SEC. 96. Effect of, generally.—In England, prior to the adoption of the Stat. 9 Geo. IV. c. 14, a part payment of a debt was treated as a sufficient acknowledgment, to uphold a promise to pay it, although the statute of James I. contained no such provision. The courts read an exception into the statute in the case of a part payment of either principal or interest; and this exception has been expressly preserved in the Stat. 9 Geo. IV. c. 14, and in all the statutes of a similar character in the States of this country except in Nevada. In Nevada, the statute contains no exception giving effect to part payment as an acknowledgment; and it is held that a part payment, unless evidenced by a writing signed by the debtor, does not have the effect either to suspend or remove the statutory bar.¹ Under this provision,

¹ *Wilcox v. Williams*, 5 Nev. 206. In Georgia, in *Holland v. Chaffin*, 22 Ga. 343, it was held that partial payment of a note, together with an express admission of the debt, are insufficient, unless the admission is in writing. See also *Pefia v. Vance*, 21 Cal. 142, and *Heinlin v. Castro*, 22 id. 100, to the same effect. In some of the early English cases arising under the 9 Geo. IV. it was held that a part payment of a debt would not take the balance out of the stat-

ute unless there was a promise in writing. *Wagh v. Cope*, 6 M. & W. 824; *Wainman v. Kynman*, 1 Exch. 118. But this doctrine was overruled by *Cleave v. Jones*, 15 Jur. 515, and never had any real foundation. Indeed, it was in defiance of the statute and its plain intent, and there can be no question but that the payment of a part of a debt, nothing being said that indicates an intention not to pay the balance, or to repudiate the existence of a balance,

the part payment of principal or interest takes the case entirely out of the statute, and such part payment may be proved in the same manner as before the statutes were enacted.¹ In such cases the part payment is made an acknowledgment by statute, and only leaves the plaintiff to establish the fact that it was made and intended as a part payment; whereas, where no statutory provision exists, such part payment only amounts to evidence from which an acknowledgment may be inferred, and is not absolutely an acknowledgment.² This proviso was enacted because the part payment of principal, or the payment of interest, stands upon a very different footing from a mere verbal promise. "A promise," observes TINDAL, C. J., "is frequently made rashly, and is always liable to misconstruction; whereas a payment is not supposed to be made unadvisedly. A person may part with his words rashly, not so with his money."³

SEC. 97. Must be made as Payment of Part of Debt. — In order to make a money payment a part payment within the statute, it must

revives the remainder of the debt, and gives it legal vitality for a new statutory period. *Jewett v. Petit*, 4 Mich. 508; *Aldrich v. Morse*, 28 Vt. 642; *State Bank v. Moody*, 11 Ark. 638; *Arnold v. Downing*, 11 Barb. (N. Y.) 554; *Rucker v. Frazier*, 4 Strobl. (S. C.) 93; *Smith v. Simms*, 9 Ga. 418; *Ayer v. Hawkins*, 19 Vt. 28. Perhaps something more than a naked payment should be shown. *Davidson v. Harrison*, 33 Miss. 41; *Davies v. Edwards*, 15 Jur. 1044; *Smith v. Westmoreland*, 21 Miss. 663. But whatever may formerly have been the doctrine in this respect, there can be no question but that, if the fact of a part payment is established, it is sufficient to renew the entire debt, unless the balance is repudiated or its existence denied, *United States v. Wilder*, 13 Wall. (U. S.) 254; or at least sufficient to warrant a jury in finding a promise to pay the balance, even though the court will not therefrom draw such an inference as a matter of law, *White v. Jordan*, 27 Me. 370; *Whipple v. Stevens*, 22 N. H. 219; *Illsley v. Jewett*, 2 Met. (Mass.) 168; *Balch v. Onion*, 4 Cush. (Mass.) 559; *Nash v. Hodgson*, 31 Eng. L. & Eq. 555; *Pond v. Williams*, 1 Gray (Mass.), 630; *Ramsay v. Warner*, 97 Mass. 8; *Sanderson v. Milton Stage Co.*, 18 Vt. 107; *Nesom v. D'Armand*, 13 La. An. 294; *Dyer v. Walker*, 54 Me. 18.

¹ *Cleaves v. Jones*, 6 Exch. 578; *Bank of Utica v. Ballou*, 49 N. Y. 155. Part

payment of the interest or principal of a debt, unaccompanied by contemporaneous qualifying acts or declarations of the payor, takes a debt out of the statute of limitations; and the statute requiring acknowledgments to be in writing alters the mode of proof, but not the effect of acknowledgments or promises, and does not affect the effect of a part payment, which is a species of acknowledgment in every sense equal to one expressed in writing. *Barron v. Kennedy*, 17 Cal. 574.

² *Ridd v. Moggridge*, 2 H. & N. 567; *Hollis v. Palmer*, 2 Bing. N. C. 713.

³ *Wyatt v. Hodson*, 1 M. & Sc. 447. In *Wesner v. Stein*, 97 Penn. St. 822, *MERCUR, J.*, says: "Part payment of a debt within six years before suit brought is sufficient from which to infer a promise to pay; but the payment must be clearly proved." *Burr v. Burr*, 27 Penn. St. 284; *Yaw v. Kerr*, 47 id. 333; *Patton v. Hassinger*, 69 id. 311. In *Barclay's Appeal*, 64 Penn. St. 67, *SHARSWOOD, J.*, says: "There can be no more unequivocal acknowledgment of a present, existing debt, than a payment on account of it;" and according to all the authorities this is all that is required to take a case out of the statutes. Part payment does not create a new debt, but revives the old one, and the action must be predicated upon the original debt. *Biscoe v. Stone*, 11 Ark. 39; *Egerey v. Decrew*, 53 Me. 392; *Elmore v. Robinson*, 18 La. An. 651.

be shown to be a payment of a portion of an admitted debt, and paid to, and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder. If the payment was intended by the debtor to be a payment of all that was due, the circumstance of the creditor's having received it, and treated it as a part payment only, will not bring it within the statute.¹ Part payment of a debt is not of itself conclusive to take the case out of the statute. In order to have that effect, it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought,² and that the payment was made as a part of a larger indebtedness,³ and under such circumstances as

¹ In *Foster v. Dawber*, 6 Exch. 852, an action of assumpsit was brought upon a promissory note for £500, dated Dec. 7, 1845, and also upon another note for the same amount, dated Jan. 20, 1846. The defendant pleaded that after making the notes it was agreed between J. Clark and the defendant that the latter should purchase with his own money a piece of paper marked with a 10s. receipt stamp, and should fill up and write on it thus: "Hull, February 16th, 1846. Received of R. Dawber (the defendant), the sums of £1,080, being the principal and interest on two notes, dated December, 1845, and January, 1846, in full of all demands." That the defendant should suffer J. Clark to sign his name, and that such purchase of the paper, and such writing out and filling up, and permitting J. Clark to sign it, should be accepted by J. Clark in full satisfaction and discharge of the said causes of action. Second plea, the statute of limitations. In 1835, J. Clark agreed to lend the defendant £1,000, on receiving two promissory notes of £500 each. The notes were given, and the interest thereupon regularly paid by the defendant to J. Clark, who, on receiving it, was in the habit of indorsing a memorandum on the back of the notes. The backs of the notes being at length entirely covered, J. Clark proposed that the notes should be cancelled and others substituted, which was accordingly done, and the notes in question given by the defendant. In February, 1846, J. Clark expressing a wish to make the defendant a present of the £1,000, directed him to buy a 10s. stamp, and draw out a receipt for £1,000, and £80 for inter-

est, and which having been done, and the receipt having been signed by Clark, no further interest was paid. J. Clark subsequently died, having previously bequeathed the notes in question to his executors, with certain directions the proceeds. It of the receipt was acknowledgment. the case out of it and that the ren January, 1846, or a promise so as to render the defendant liable, by a new promise, to pay the original notes. *Tippets v. Heane*, 1 C. M. & R. 252.

² *Tippets v. Heane*, 4 Tyrwh. 772; *Wainman v. Kynman*, 1 Exch. 118. This rule and its application is well illustrated in a Pennsylvania case, where the payment of the costs to the prothonotary was held not to take the judgment out of the statute, because the costs were not a part of the debt. *Strawnes v. Hook*, 25 Penn. St. 391.

³ *A'Court v. Cross*, 3 Bing. 329. In *Tippets v. Heane*, *ante*, PARKE, B., says: "In order to take a case out of the statute of limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt; secondly, it must appear that the payment was made on account of the debt for which the action is brought. But the case must go further, for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the

warrant a jury in finding an implied promise to pay the balance ;¹ and if the payment was made under such circumstances as to rebut any

part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt."

¹ *Linsell v. Bonsor*, 2 Bing. 241, where an action was brought to recover £242 11s.; and it was proved that the defendant within six years, upon being called upon for interest, said a sovereign, and said that he owed the money but would not pay it. It was left to the jury to say whether he used the words in earnest or in jest; and they having found that he used them in earnest, it was held that the payment of the sovereign did not take the debt out of the statute. A part payment will not take a case out of the statute of limitations, unless it is expressly made as part payment in discharge of liability for a larger amount, and with the intention of admitting a liability to pay the residue. Prior to the case of *A'Court v. Cross*, *ante*, it was supposed that the mere acknowledgment of a debt was a waiver of the statute; but that case decided that the acknowledgment must be such as to operate as a new promise. In that case, BEST, C. J., says: "There are many cases from which it may be collected that if there be anything said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute." It is for the jury to say *quo animo* the party makes the admission. The mere act of part payment does not of itself take the case out of the statute, but the payment must be made with a view to revive the debtor's liability. In the case of *Bateman v. Pinder*, 3 Q. B. 574, the court put part payment on the same footing as an acknowledgment. And where a party revives a debt by paying it into court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest. *Collyer v. Willock*, 5 Bing. 513. So, where some items of account are barred by the statute, a part payment by the debtor, without appropriation to such items, will not take them out of the statute. *Mills v. Fowkes*, 5 Bing. N. C. 455. Those authorities show that the part payment must be made with

the intention of creating a new liability to pay the debt. The acknowledgment must be such as would authorize the jury to imply from it a promise to pay, and that question should be left to them. *Linsell v. Bonsor*, 2 Bing. N. C. 241; *Wakeman v. Sherman*, 9 N. Y. 88; *Chambers v. Garland*, 3 Greene (Iowa), 322. In *Harper v. Frailey*, 53 N. Y. 542, it was held that it must be made by the party to be charged, or by some person authorized to make a new promise on his behalf for the residue. Where the plaintiff held notes against the defendant, which were dated more than six years before the commencement of his action, and the jury found the fact that within six years the defendant made a general payment to the plaintiff on account of some one or more of the notes, or of the indebtedness manifested by them, it was held that a promise of further payment must be implied; that it was not essential that the defendant should have recollected the giving of the notes at the time of making the payment, if he was aware of the indebtedness for which they were given, and acted with reference to it. *Ayer v. Hawkins*, 19 Vt. 26. The plaintiff had an account against the defendants, for the payment of a portion of which a third person was liable to the defendants. Within a year before the commencement of the action one of the defendants, together with the plaintiff and such third person, examined the plaintiff's account, and no objection was made to any portion of it, and the items for which such third person was holden were selected and paid for, and credit was given by the plaintiff for the payment, upon account, and it was held that it was sufficient to take the case out of the statute. *Sanderson v. Milton Stage Co.*, 18 Vt. 107. In an action by an administrator on a promissory note commenced more than six years after the date of the note, an indorsement in the handwriting of the intestate of a payment purporting to have been made more than two years before the statute of limitations would attach, and six months prior to his death, held, the jury might regard it as evidence of a new promise, though there

such promise, it does not affect the operation of the statute. Thus, where a debtor paid to a creditor a less sum than was due, under an agreement on the part of the creditor to accept it in full, it was held that such payment did not remove the statute bar.¹ If it stands ambiguous whether the payment is a part payment of an existing debt, more being admitted to be due, or whether the payment was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation.² In some of the States, it is held that a partial

was no proof other than as above of the time when said indorsement was actually made. *Coffin v. Bucknam*, 12 Me. 471. A deceased party had made in his books, within three years, an entry settling an account against the plaintiff, crediting him, "by amount of services rendered on account, \$398.53." Among the papers of his executrix, after her death, was found a receipt given by plaintiff to the executrix for \$307.86, "on account of services rendered the deceased in his lifetime," dated about six months before the bringing of this action. The plaintiff brought his action on account for services rendered as clerk and agent for the deceased against his administrators *de bonis non*. Held, that the entry and receipt were sufficient to remove the bar of the statute of limitations, which, without them, would have been an effective one to the action. *Quynn v. Carroll*, 10 Md. 197. An indorsement, in the plaintiff's handwriting, of a partial payment on a witnessed note within twenty years, together with testimony that the defendant had since said he would pay the balance of the principal, was held to revive a note dated more than twenty years since. *Howe v. Saunders*, 38 Me. 350.

¹ *Berrian v. New York*, 4 Robt. (N. Y. Superior Ct.) 538.

² *Waugh v. Cope*, 6 M. & W. 829; *Burkitt v. Blanshard*, 3 Exch. 89.

In *Lawrence v. Harrington*, 122 N. Y. 408, it was held: Conversion is not a "fraud" within the meaning of that word as used in a provision of the bankrupt act, which provides that "no debt created by fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under this act."

The fraud intended by the law is a positive fraud, or fraud in fact, as distin-

guished from constructive fraud, founded upon some breach of duty. The expression "fiduciary character," as used in said provision, refers to cases of technical trust, actually and expressly constituted, and does not include those which the law implies from the contract of the parties.

Bradner v. Strong, 89 N. Y. 299, distinguished.

A promise by which a debt discharged in bankruptcy is renewed, must be express and distinct, it cannot be implied or inferred; and so partial payments will not revive the debt in this respect. The rule in this respect is different from that applied to the defence of the statute of limitations. In an action to recover for moneys expended for the use of a firm, of which defendant is the survivor, it appeared that the plaintiffs loaned to the defendant's firm their promissory notes. Subsequently said firm filed a petition in bankruptcy, and were adjudged bankrupts, and were discharged. Two of the notes were thereafter renewed by new notes, made by the plaintiffs, to the order of the defendant's firm, and by them indorsed and passed to the bank holding the original notes, and some payments were made to the plaintiffs by the defendant's firm upon the account. It was held that a new promise was to be implied, from the indorsement of the renewal notes, to pay so much of the debt, but not to pay the balance represented by the other notes; also, that the payment on account was not sufficient to authorize a finding of a promise to pay the residue of the debt.

After the discharge in bankruptcy, the defendant wrote to the plaintiffs letters containing these statements: "We do not calculate you will suffer any loss by us; we will do the best we can and all that is in our power to save you harmless." It

payment of a note or other similar obligation does not remove the statute bar as to the balance, unless it is accompanied by an express acknowledgment of a further indebtedness, or by an express promise to pay it;¹ but this doctrine will be found to be predicated upon the peculiar wording of the statute, or upon erroneous grounds of decision which do not generally prevail in the English, or in the great majority of our own courts, — the rule generally adopted being that a general payment on account of a greater debt, unaccompanied by any qualifying acts, removes the statute bar as to the balance.²

SEC. 98. Must be Nothing to repel Inference of Admission that more is due. — If the payment is accompanied by declarations and statements, from some of which it is to be inferred that a further debt still remained due, and from others that all further liability was repudiated, it is for a jury to draw their own inferences from the statements made, and adopt or reject what portions of them they think fit.³ If there is a mere naked payment of money, without anything to show on what account or for what reason the money was paid, the payment will be of no avail under the statute. If the party merely was held that these statements did not indicate an intention to pay at all events. The plaintiffs delivered to the defendant's firm their promissory note to procure it to be discounted and send to them the proceeds; said firm received and appropriated the proceeds to their own use. Two of the notes loaned, as above stated, were loaned to take up the note so appropriated. It was held, the fact that said notes had their origin in the conversion of the proceeds of the former note did not take them out of the operation of the discharge in bankruptcy. The renewal notes matured in 1878, and were then paid by plaintiffs. In 1883 and 1884 work was done by defendant's firm for plaintiffs, under an agreement that one-half of the amount should be credited upon the old accounts, and credits were accordingly given. It was held that such credits might be considered as payments, which would take the case out of the operation of the statute of limitations.

¹ *Smith v. Westmoreland*, 20 Miss. 636; *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Seel v. Matthews*, 7 Yerg. (Tenn.) 313.

² *Semmes v. Magruder*, 10 Md. 242; *Foster v. Starkey*, 12 Cush. (Mass.) 324; *Niemcewicz v. Bartlett*, 13 Ohio, 271; *Burr v. Burr*, 26 Penn. St. 284; *Whipple v. Stevens*, 22 N. H. 219; *Barron v. Kennedy*, 17 Cal. 574; *Sanford v. Hayes*, 19 Conn. 591; *Bridgeton v. Jones*, 34 Mo.

471; *Hunt v. Holly*, 18 Ga. 378; *McLaren v. McMartin*, 36 N. Y. 88. Where there is a running account between parties of long standing, of which the debtor has never been furnished with the items, or otherwise apprised of the entries therein, it has been held not sufficient to warrant the court in so applying a general payment as to take the whole debt out of the statute, but that the question should be left to the jury to find on account of what indebtedness the payment was made. *Beltzhoover v. Jewell*, 11 G. & J. (Md.) 212. But while this may be the rule where there is anything attending the payment or anything connected with the account itself which raises a doubt as to the application which the debtor intended should be made of the payment, yet it is not believed that the mere circumstance that the debtor was ignorant of the items of an account, or failed to make inquiries in that regard, as a prudent man should do, will in any sense alter the legal effect of a general payment made thereon.

³ *Wainman v. Kynman*, 1 Exch. 118; *Baildon v. Walton*, 1 Exch. 617.

In *Blair v. Lynch*, 105 N. Y. 636, it was held that a payment, such as will avert the effect of the statute of limitation as a bar, must be a conscious and voluntary act on the part of the debtor, explainable only as a recognition and confession of the existing liability.

says, "Place the money to my account," without specifying any account or any debt, and the creditor appropriates the payment in part liquidation of the debt barred by the statute, without the privity or assent of the debtor, this will be of no avail as an acknowledgment of the debt by the debtor; but it will be otherwise if the appropriation is made with the privity and assent of the latter. If there is a disputed and an undisputed debt, or if there are two debts, — one barred by the statute and the other not barred, — a general payment on account will be of no avail at common law, under the statute, because it is left uncertain to which debt the payment was intended to be applied.¹ But all the surrounding circumstances may be regarded to ascertain the intent of the debtor in making the payment, and see whether there is any evidence to show to which debt he intended it to be applied.² The particular account on which the money was paid may be proved by subsequent declarations or statements of the party making the payment, as well as by declarations accompanying the act of payment. If, therefore, the fact of the payment is proved, any subsequent statement or declaration of the party, although made after action brought, may be given in evidence, to show either that the payment was the interest of a debt due, or that it was a part payment of principal, or that it was made in reduction of some particular debt proved or admitted to be due.³ The burden of establishing a part payment sufficient as to time

¹ *Burn v. Boulton*, 2 C. B. 476; *Milles v. Fowkes*, 5 Bing. N. C. 455.

² *Nash v. Hodgson*, 1 Jur. N. s. 948.

³ *Waters v. Tompkins*, 2 C. M. & R. 720. In *Bevan v. Gehling*, 3 Q. B. 742, in an action upon a promissory note to which the statute was pleaded the plaintiff gave evidence that the defendant had paid five shillings on account of the note. He then offered to prove that the defendant, on a subsequent occasion, admitted orally that he made such payment on account of the note; and it was held that such evidence was properly admissible. In the cases of *Willis v. Newham*, 8 Y. & J. 518, and *Bayley v. Ashton*, 12 Ad. & El. 493, oral evidence of part payment as an acknowledgment was held insufficient; but in *Waters v. Tompkins*, 2 C. M. & R. 237, part payment having been proved otherwise than by admissions, it was held that oral declarations were receivable to show that the payment, when made, had been appropriated to the debt in question. *Moore v. Strong*, 1 New Cas. 441, and *Trentham v. Deverill*, 3 id. 397, also show how far evidence of this kind is admissible to support or explain other proof of a payment. In the subsequent case of *Maghee*

v. O'Neil, 7 M. & W. 531, where the decision in *Willis v. Newham*, *ante*, was adhered to, LORD ABINGER, C. B., said: "If this question were *res integra*, I should certainly say that the mode of payment of principal or interest was left by LORD TENTERDEN's act to be proved as at common law. But we are not sitting here as a court of error. . . . My impression, however, is, that the act of Parliament has been pressed beyond its intention." And PARKE, B., referring to *Willis v. Newham*, *ante*, and *Bayley v. Ashton*, *ante*, said: "My feeling certainly is, that those decisions have gone too far; but sitting as we do, with a co-ordinate jurisdiction only, we cannot overrule the judgment of the Court of Queen's Bench." He intimated, however, that the plaintiff might, in a fresh action, bring error; and he added: "If it comes before us in that shape, I shall then hold myself fully at liberty to consider it independently of the cases." And the case of *Bevan v. Gehling*, *ante*, which was decided subsequently to all the preceding cases, adopted the doctrine of *Waters v. Tompkins*, *ante*, and *Bank of Utica v. Ballou*, 49 N. Y. 155.

and other circumstances to remove the statute bar is upon the plaintiff.¹

SEC. 99. Payment of Representatives of Debtor. — In New York it is held that under the code, as before, part payment does not take a debt out of the statute, unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt, and signified his willingness to pay it. Thus, payment by an assignee, in trust for the benefit of creditors, does not take the case out of the statute as to the debtor, except upon an express authorization by him; and any authority to the assignee to pay part of it is a recognition by the debtor on the day when the authority is given, and not on the subsequent day of payment; and in a case where the assignment was before the bar had run and authorized payment of all debts for money borrowed, it was held that the statute ran against the debt from the day of the assignment.² From what has been said, as well as upon principle, it may be said that a part payment, except in those States where by statute it is expressly given effect to, as before stated in this section, has no greater effect than any other unqualified acknowledgment, and, consequently, must be connected both with the parties and the claim in suit, by sufficient evidence.³

SEC. 100. Rule in *Tippets v. Heane*. — In the case first cited in the preceding note, the plaintiff proved by a witness that he, by the direction of the defendant, paid to the plaintiff £10 within six years; but the witness was unable to say upon what account the money was paid, or to give any evidence beyond the mere fact of having paid the money by the defendant's direction. The judge left it to the jury to say whether the money was paid on account of the debt in suit; and also observed to them, that no other account between the parties was shown

¹ *Biggs v. Roberts*, 85 N. C. 451. In this case, the court held that the obstruction of the statute of limitations may be removed by an act of partial payment, proved to have been made at a time commencing from which the prescribed limitation would not have expired at the beginning of the action; but the burden is upon the plaintiff to show that the partial payment was made at such a time as to save the debt from the operation of the statute. An unaccepted offer to discharge the bond by a conveyance of land is not such a recognition of a subsisting liability as in law will imply a promise to pay the debt. In *Fleming v. Hayne*, 1 Starkie, 370, LORD ELLENBOROUGH instructed the jury: "You ought to be satisfied that the defendant made a distinct, unequivocal promise to pay before he is placed again in the responsible situation from which the law has discharged him." See also *Green v. Greensboro*, 83 N. C. 449; *Fraleigh v.*

Kelly, 67 id. 78; *Henly v. Lanier*, 75 id. 172; *Faisson v. Bowden*, 72 id. 405. The new promise which will revive a debt extinguished by bankruptcy must be distinct and specific; and a mere acknowledgment of the debt, though implying a promise to pay, is not sufficient. It was held by the Supreme Court of Massachusetts that even a payment of interest or principal indorsed on the note by the debtor himself is insufficient to warrant a jury in inferring a new promise to pay the residue of the debt. *Merriam v. Bayley*, 1 Cush. (Mass.) 77; *Savings Inst. v. Littlefield*, 6 id. 210.

² *Pickett v. King*, 34 Barb. (N. Y.) 193. See also, to the same effect, *Richardson v. Thomas*, 13 Gray (Mass.), 381; *Roosevelt v. Marks*, 6 Johns. (N. Y.) Ch. 266.

³ *Tippets v. Heane*, 1 C. M. & R. 253; *Bateman v. Boulton*, 2 C. B. 476; *Wainman v. Kynman*, 1 Exch. 118; *Mills v. Fouke*, 4 Bing. N. C. 76.

to have existed at the time when the payment was made. The jury having found a verdict for the plaintiff, the Court of Exchequer set it aside, on the ground that there was no evidence from which the jury were warranted in finding that by the payment the defendant admitted that more was due; in other words, that there was no evidence that the defendant intended it as a part payment of a greater debt. In another English case,¹ it appeared that the plaintiff, an attorney, had done professional business of various kinds for the defendant in 1827 and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were £2 2s. and 10s. 6d., enclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the £2 2s. and 10s. 6d. were paid to the plaintiff on the production of those receipts. In 1838, the plaintiff delivered to the defendant a bill of costs, amounting to £289, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for £3 and £5 cash lent; the rest of the bill was for professional business. The court held that the letters given in evidence did not sufficiently show that the money paid was paid in part satisfaction of the debt in suit, to remove the statute bar. LORD ABINGER, C. B., said: "There have been several cases in which it has been considered, after much discussion, and adopted by all the courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favor it is made, to be made in part payment of the debt in question: if it stands ambiguous, whether it be part payment of an existing debt, or payment generally, without the admission of any greater debt as due to the party; if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, — then it is not sufficient to bar the statute of limitations. And we think it does not satisfactorily appear, from the letters given in evidence in this case, that the defendant admitted that there was any existing account against him, more than the sum he was paying; all that he admits is, that the money, when received, is to be applied in discharge of the account which the plaintiff had against him; but there is no distinct admission that that was an existing debt of which that was a payment in part. We think, therefore, that the case falls within the principles of the decisions in this court, and also in the Court of Common Pleas, and that the rule must be made absolute to enter a verdict for the defendant on the plea of the statute." And the rule adopted in this case is generally followed in this country.²

¹ *Waugh v. Cope*, 6 M. & W. 824.

² *Hodge v. Manley*, 25 Vt. 210; *Arnold*

SEC. 101. Payment must be authorized and voluntary. — Not only is it necessary that the debt must be identified, and the payment shown to be a part payment, but it must also be unaccompanied with any declarations or circumstances that rebut the inference of a willingness and intention on the part of the debtor to pay the balance ;¹ and it must have

v. Downing, 11 Barb. (N. Y.) 554. The court cannot imply a promise, so as to take a contract out of the operation of the statute of limitations, as an inference of law, from the mere payment of a part of the debt ; but the evidence should be submitted by the court to the jury, with proper instructions. *White v. Jordan*, 27 Me. 370. And if it is shown, or the jury find, that the payment was made by the debtor, and was intended by him as a part payment of a greater debt, it is sufficient, as a part payment is of itself an admission of the existence of the debt, and an implied promise to pay the balance, unless accompanying circumstances or declarations negative the admission. *Burr v. Williams*, 20 Ark. 171. A part payment to stop the statute must be such as admits the existence of a greater debt, *Prenatt v. Runyon*, 12 Ind. 174 ; and must appear to be a payment made on account of the debt for which the action was brought. And it must further appear that the payment was made as part payment of a larger debt, and that it was voluntary on the part of the debtor ; and it must occur under such circumstances as are consistent with an intent to pay such balance. *Arnold v. Downing*, 11 Barb. (N. Y.) 554.

Evidence of a want of consideration for a note sued upon is not admissible to disprove a partial payment indorsed thereon, and relied upon by the holder to save the statute of limitations. *Dividson v. Delano*, 11 Allen (Mass.), 523. But an intention that the payment should be a part payment must be shown either by the debtor's declarations, acts, or the circumstances. The question as to when the payment became effective is also to be gathered from the circumstances. Thus, where a debtor does work for his creditor, at different periods, in payment of his indebtedness, and the account for such work is stated, and allowed by the parties as a payment, the aggregate amount of the account will be a payment as of the date of the statement and allowance, and not as of the dates of the several items of the account, in the absence of any agreement to that effect. *Borden v. Peay*, 20 Ark. 293.

¹ *Smith v. Eastman*, 3 Cush. (Mass.) 355 ; *Ball v. Crawford*, 8 Gratt. (Va.) 110.

Under the La. Code, a widow is not liable *in solido* with the surviving partners of her husband on a firm note, even where she has accepted the succession without benefit of inventory ; payments, therefore, made by them, do not interrupt the running of the prescription in her favor. *Henderson v. Wadsworth*, 115 U. S. 264. The holder of a note threatened to sue the surety unless a payment was made at once. The maker, in the holder's presence, handed money to the surety, and the surety handed it to the holder. It was held that the payment was to be deemed the surety's. *Green v. Morris*, 58 Vt. 35. While the bankrupt act was in force, an assignee in insolvency proceedings under the State law, under order of court made a payment on a note of the insolvent. It was held that this payment did not suspend the running of the statute. *Benton v. Holland*, 58 Vt. 533. Part payment, within six years, of a book account with an express verbal promise to pay the balance takes the balance out of the bar of the statute. *State v. Corlies*, 47 N. J. L. 108.

If the holder of a note draws an order on a surety on it, and the order is paid, this is a payment on the note which, as to such surety, takes the case out of the bar of the statute. *Long v. Miller*, 93 N. C. 233. Payments made by the maker of a note after its maturity do not suspend the running of the statute in favor of the sureties. *Walters v. Kraft*, 23 S. C. 578 ; s. c. 55 Am. Rep. 44. Part payment does not stop the running of the statute as to debts arising out of different transactions from that on which the part payment was made. *Compton v. Johnson*, 19 Mo. App. 88. If an indorsement of payments on a note is relied on to take the case out of the bar of the statute, plaintiff must prove when the payments were made. *Loewer v. Haug*, 20 Mo. App. 163.

Part payment of a trustee, from the proceeds of a trustee sale, of part of a

been made by the debtor in person, or by some one authorized by him, to make a new promise on his behalf.¹ And a payment made by a third person, without authority from the debtor to make it, cannot remove the statute bar, because it does not imply any acknowledgment of the debt by the debtor.² Under this rule, it is held that a partial payment by an assignee for the benefit of creditors will not remove the bar as to

debt secured by the deed of trust, does not arrest the running of the statute in favor of the debtor on the residue of the debt. *Leach v. Asher*, 20 Mo. App. 656. In a Nebraska case, taxes were levied and collected for interest on municipal bonds, and payments were made accordingly. It was held that such payments took the bonds out of the bar of the statute. *School District v. Xenia Bank*, 19 Neb. 89.

A part payment cannot give vitality to a void promise to pay. *Miner v. Lorman*, 56 Mich. 212; but payment and acceptance of interest on a note stops the running of the statute. *De Koslowski v. Yesler*, 2 Wash. 407.

¹ *Harper v. Frailey*, 53 N. Y. 442; *Smith v. Coon*, 22 La. An. 445. A payment by one as tutor for an estate he is administering both as curator and tutor interrupts the running of the statute in favor of the estate. *Succession of Ducker*, 10 La. An. 758. If a surety makes a payment upon the note as agent of the principal, it interrupts the statute as to him, unless he discloses the character in which he makes the payment at the time. *Holmes v. Durrell*, 51 Me. 201. But a payment by the principal does not renew the note as to a surety, unless he is a party to such payment. *Hunter v. Robertson*, 30 Ga. 479. In *Galpin v. Barney*, 37 Vt. 627, a payment made by an agent after his agency had terminated, was held inoperative to remove the statute bar.

In *Littlefield v. Littlefield*, 91 N. Y. 203, it was held that while a debtor may confer authority upon another to make a payment for him which will be effectual as against a plea of the statute of limitations, the authority should be clearly established. Thus, one of three makers of a joint-and-several promissory note, who in fact signed it as surety, upon being applied to for payment, requested the payee to tell the principal that he must make a payment thereon, and that he (the surety) said so. The payee made the statement to the principal

as requested, who promised to and did subsequently make a payment; this he reported to the surety, who in response stated that it was all right. In an action upon the note, it was held that these facts did not show an authority conferred upon the principal to make a payment as the agent of the surety, so as to take the case as to the latter out of the statute of limitations; also that they failed to establish a ratification of the payment.

Winchell v. Hicks, 18 N. Y. 558; *First Nat. Bk. v. Ballou*, 49 id. 155, distinguished.

² *Smith v. Coon*, 22 La. An. 445; *Rich v. Niagara Savings Bank*, 3 Hun (N. Y.), 481. Where a payment is made by an agent without authority, and the principal afterwards assents thereto, he is bound by it, and it has the same effect as though made by himself, *First National Bank of Utica v. Ballou*, 49 N. Y. 155; but if the debtor does not assent thereto, he is not bound, *Harper v. Frailey*, 53 N. Y. 542. A part payment made by the wife is not sufficient, unless she had authority. *Butler v. Price*, 115 Mass. 578. A promissory note for \$1,000, made by H., and payable to the order of T. ninety days after date, with T. and M. as indorsers, was discounted at a bank, and, not being paid at maturity, was duly protested. The maker of the note failed, and made an assignment of his property. Soon after the note became due, T. paid one-half the same to the bank. The assignees of the maker of the note having made a dividend of nine per cent, and having paid T. \$90 to be applied on this note, kept half, and gave the other half to the bank on the note. The cashier, upon being informed of the above facts, indorsed \$45 on the note as paid by T. M. paid the bank the amount due on the note, and sued T. upon it. Held, that the payment of \$45 by T., which was made within six years of the commencement of the action, took the note out of the statute of limitations. *Miller v. Talcott*, 46 Barb. (N. Y.) 167.

the assignor; ¹ nor will the payment of a judgment obtained against a debtor by default renew the debt as to the balance; ² nor does the payment of a dividend in the Orphans' Court by an administrator preclude him or his successor in the office from pleading the statute as to the balance; ³ nor will any compulsory payment have the effect to remove the statute bar. Thus, in a Louisiana case ⁴ during the late civil war, the debtor was compelled to pay a debt due to the plaintiffs to a receiver of the Confederate States, which was paid in an unlawful currency. It was held that such payment did not interrupt prescription on the note. Nor will a part payment by an administrator, under a surrogate's decree, take the debt out of the statute as to the residue; ⁵ nor a payment by one partner upon a partnership debt, after the partnership is dissolved. ⁶ Nor does a part payment derived from a collateral security, without the debtor's assent to it *as a payment*, operate to remove the statute bar; ⁷ and although in some of the cases ⁸ it is inti-

¹ *Roosevelt v. Marks*, 6 Johns. (N. Y.) Ch. 266; *Pickett v. Leonard*, 34 N. Y. 175; *Pickett v. King*, 34 Barb. (N. Y.) 193; *Barger v. Durain*, 26 id. 68. Holding a contrary doctrine was overruled by the last-cited case. *Davies v. Edwards*, 7 Exch. 22; *Read v. Johnson*, 1 R. I. 21; *Marienthal v. Mosler*, 16 Ohio St. 566; *Roscoe v. Hale*, 7 Gray (Mass.), 274; *Stuart v. Foster*, 18 Abb. (N. Y.) Pr. 305; *Stoddard v. Doane*, 7 Gray (Mass.), 387; *Richardson v. Thomas*, 13 id. 381.

² *Goodwin v. Buzzell*, 35 Vt. 9.

³ *Miller v. Dorsey*, 9 Md. 317.

⁴ *New York Belting Co. v. Jones*, 22 La. An. 530.

⁵ *Arnold v. Downing*, 11 Barb. (N. Y.) 554; and a partial payment by an administrator upon a debt already barred does not remove the statute bar as to the balance. *McLaren v. Martin*, 36 N. Y. 88. But the rule would be otherwise as to a payment before the statute has run. *Heath v. Grenell*, 61 Barb. (N. Y.) 190.

⁶ *Graham v. Selover*, 59 Barb. (N. Y.) 313. But in Missouri a part payment by one partner after dissolution, five years before suit brought, takes the debt out of the statute. *McClurg v. Howard*, 45 Mo. 365. So also in Connecticut. *Bissell v. Adams*, 35 Conn. 299.

⁷ *Harper v. Fairley*, 53 N. Y. 442. In *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568, the debtor at the time he executed the note in suit, left certain notes and accounts in the hands of the payee as collateral security, and authorized him to

collect the same and apply the proceeds upon the note. The payee collected some of the notes and accounts after more than six years from the date of the note, and applied the amount upon the note. In an action upon the note brought more than six years after its date, the statute of limitations was pleaded, and the plaintiff set up the receipt of the money upon such notes and accounts as a part payment. But the court held that the application of the money so collected upon the note *without notice to the payor*, could not operate as a part payment sufficient to remove the statute bar. STANLEY, J., said: "Assuming for the purposes of this case that the plaintiff's receipt of the proceeds of the collateral security, and his application of them in part payment of the debt, were in every sense legal and right, there are many cases in which the creditor's legal receipt and application of a payment do not show a new promise of the debtor. *Mills v. Fowkes*, 5 Bing. N. C. 455; *Nash v. Hodgson*, 6 De G. M. & G. 474; *Burn v. Boulton*, 2 C. B. 476; *Bank v. Woody*, 10 Ark. 638; *Wood v. Wylds*, 6 id. 754; *Pond v. Williams*, 1 Gray (Mass.), 630; *Walker v. Butler*, 6 El. & Bl. 506.

"But such payment need not be made by the party himself. It may be made by an agent duly authorized for that purpose, and payment so made will be as effectual as if made by the principal. But it is not enough that the agent is authorized to make the payment; his authority must enable him to bind the principal by a prom-

⁸ *Porter v. Blood*, 5 Pick. (Mass.) 476.

mated that a sale of collaterals made *within a reasonable time* after they are deposited with the creditor, and the proceeds applied upon the debt, may operate as a part payment at the date of the receipt of such

ise to pay, and such authority cannot be implied from the bare authority to make the payment. *Winchell v. Hicks*, 18 N. Y. 558.

“So it is settled by numerous authorities that a payment by assignees in bankruptcy or insolvency does not take a case out of the statute. *Roscoe v. Hale*, 7 Gray (Mass.), 274; *Stoddard v. Doane*, id. 387; *Pickett v. Leonard*, 34 N. Y. 175; *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 292; *Davies v. Edwards*, 7 Exch. 22; 1 Sm. Lead. Cas. 869, 890. And this is upon the ground, not that the payment was not authorized, but that the authority did not extend to binding the party by an acknowledgment of the debt and a promise to pay it.

“What was the contract between these parties, and what was its legal effect? The defendant placed in the plaintiff's hands the notes, accounts, and chattels, as collateral security for the note in suit. He authorized the plaintiff to collect and convert them into money, and apply the proceeds in payment of the note. He, in fact, made an assignment of that part of his property for the payment of the plaintiff's debt. He was the assignor, the plaintiff the assignee; and it is the same in principle as if he had made an assignment of all his property for the benefit of all his creditors. This was the whole extent of his contract, and the limit of the plaintiff's authority. The plaintiff's right, in this case, to receive the proceeds and to apply them in part payment, and his exercise of that right within six years of the date of the writ, were neither a promise made by the defendant within that time to pay the residue of the debt, nor an acknowledgment made by the defendant within that time of his liability and willingness to pay the residue, nor evidence from which it can be inferred that within that time the defendant made, or intended to make, or was understood to make, such promise or acknowledgment. What the defendant did in 1862 was an acknowledgment of a liability and a promise to pay at that time, but it has no tendency to prove that he afterwards made such promise and acknowledgment, or authorized them to be

made. The placing of the security in the plaintiff's hands was of no greater force or effect than the giving of the note itself. It was not understood or intended to be a future promise, or a future acknowledgment of a future liability and a future willingness to pay; nor is there any evidence of knowledge on the part of the defendant of the collection or application of the money upon the note, or of any information in regard to it, from the date of the note in suit until this suit was brought, so that the defendant's assent to the indorsement cannot be presumed. How then can it be said, that the indorsement relied on by the plaintiff is evidence of an acknowledgment and a willingness to pay, from which a promise to pay the balance can be implied? How can the assent of the defendant be presumed, when he had no knowledge? How can such payment be treated as part payment of a greater debt? What is there to show that the defendant did not understand, when the collateral was placed in the plaintiff's hands, that it was not sufficient to satisfy the principal debt? If no promise can be implied from a payment by assignees in bankruptcy, or in insolvency, or in case of a voluntary assignment, certainly none can be implied from the facts disclosed in this case. When the defendant placed the collateral in the plaintiff's hands, he conferred upon him authority only to collect and apply the proceeds upon his note. He made the plaintiff his agent for that purpose alone. He set apart so much of his property and placed it in the plaintiff's hands as security for his debt. The plaintiff can stand no better than if the collateral had been placed in the hands of a third party, with authority only to collect and apply the proceeds on the plaintiff's debt. Under such circumstances the application could not be treated as a payment from which a new promise could be implied, for the obvious reason that the agent's authority did not go to that extent. If the payment by the agent under such circumstances is such that a new promise may be implied from it, then the principal is bound by the act of the agent beyond the scope of his authority.”

proceeds, yet this doctrine is believed to be fallacious, and rests upon the mistaken notion that the creditor is thereby made an agent of the debtor for the collection or sale of such collaterals, ignoring the circumstance that the creditor cannot be made the agent of the debtor to such an extent as to make an act done by him, operate as a new promise to himself, without which ingredient or element a payment cannot operate to remove the statute bar; and according to the later cases it seems that the question as to whether the creditor exercises diligence or not, in the sale or collection of the collaterals, has no influence upon the question of part payment, as the statute can, in any event, only be suspended by some act of the debtor, or some person authorized by him, from which a new promise may be inferred, and in this view the suspension of the statute could only be claimed from the time when such collaterals were deposited with the creditor.¹ In the last named case, STANLEY, J., said, "The plaintiff relies upon some authorities which recognize the doctrine that a debtor's giving collateral security, and the creditor's application of the proceeds of it within a reasonable time are evidence of a new promise made at the time of its application. The qualification of a reasonable time relieves the doctrine of a degree of injustice, but furnishes no sound foundation. It signifies that the doctrine is based upon the creditor's authority to receive the proceeds of the security in payment of the debt within a reasonable time; but the creditor's lien upon the pledged property, and his authority to appropriate the proceeds, are not restricted in that way. *He is authorized to receive the proceeds after a reasonable time and apply them to the debt;* but what he receives *after* the expiration of a reasonable time, is as much a payment as what he receives before, and his authority in the former case is as clear as in the latter. His authority in both cases is to receive payment out of the proceeds. The foundation of the doctrine of a new promise of the debtor, within a reasonable time, supposed to exist in a *limited* authority of the creditor to receive payment, derived from collateral security within a reasonable time wholly fails. There is a material difference between receiving a payment and making one. The plaintiff's authority was not to make a payment of the proceeds, but to *receive* them in payment, and whether what he did was receiving a payment or making one, *it was not done by the defendant or by his authority*, within six years of the date of the writ, and it is immaterial whether it was done by the plaintiff within a reasonable time. Authority given to the plaintiff by the defendant to receive the proceeds of the security within or beyond a reasonable time, *is no evidence of authority given him to bind the defendant by a new promise or acknowledgment*. If the plaintiff's receipt of payment of part of the debt from the security within the six years, was, for some purposes, a payment made by the defendant, *it was not made under such circumstances that his promise to pay the remainder can easily be inferred from it.*" But if the debtor himself should sell or collect any of such collaterals, and pass

¹ Brown v. Latham, *ante*.

the proceeds over to the creditor, such act would amount to a part payment sufficient to remove the statute bar, because from such act a new promise could fairly be raised,¹ and such also would be the case if a third person authorized by the debtor to sell collaterals and make such application, should hand over the money to the creditor, received from such collaterals, because, unless his authority had been previously revoked, he would be authorized to make the payment, with all the legal consequences which could be implied therefrom. If, by an agreement between the parties, a third person is to pay a part of a certain debt, and the creditor consents to accept him as debtor to that amount, it is treated as a payment at the time when the agreement is entered into, and the statute begins to run again from that date, although the money is not in fact paid until some time afterwards;² but where a third party agrees with the debtor to assume the payment of a note, and the payee does not accept him as payor in lieu of the original debtor, the statute is not interrupted by a payment made by such third party, until payment is actually made.³

SEC. 102. Rule in *Linsell v. Bonsor*.—In an English case,⁴ the defendant had given a sum of money to an agent, with instructions not to pay it to the plaintiff unless he would receive it in full of the debt; but the agent disregarded the instructions, and paid the money, and took a receipt for it on account. The court held that the payment under these circumstances could not be held as a part payment so as to defeat the statute, because there was no intention on the defendant's part to admit his liability for the residue of the debt, and that, the agent having exceeded his authority, his act could not bind the defendant. A payment made upon a note by the sale of collaterals, deposited with the creditor by the debtor at the time a note was given, will not operate to suspend or defeat the operation of the statute, even though it is evident that an immediate sale of the collaterals was not contemplated by the parties.⁵ Generally it may be said that the payment or acknowledgment was made by the defendant, and also that it was made by him in the capacity in which he is sued; as, in an action against an executor or administrator, if it is sought to take the case out of the statute by reason of a part payment made by him, it must be shown to have been made by him in his representative character.⁶ So, too, the payment must have been such as was binding upon the plaintiff, and must have been made to the holder of the security, or some person by him authorized to receive it.

SEC. 103. Payment made to Agent binding, when.—A payment made to an agent of the creditor is sufficient;⁷ and upon principle, if the creditor ratifies the payment to a third person, although such person had no authority to receive it for him, it binds him, and is

¹ *Whipple v. Blackington*, 97 Mass. 476.

² *Butts v. Perkins*, 41 Barb. (N.Y.) 509.

³ *Cockfield v. Farley*, 21 La. An. 521.

⁴ *Linsell v. Bonsor*, 2 Bing. N. C. 241.

⁵ *Lyon v. State Bank*, 12 Ala. 508.

⁶ *Larson v. Lambert*, 12 N. J. L. 255;

Scholey v. Walton, 12 M. & W. 516.

⁷ *Edwards v. Jones*, 1 K. & J. 534;

Evans v. Davies, 4 Ad. & El. 840.

operative to remove the statutory bar. In Nevada, it has been held that a new promise must be made to some person authorized to receive it, and that a remittance of money to a stranger to the debt, to pay it over and have it applied on the debt, is not sufficient.¹ In any event, in order that a payment made to a third person shall operate as a payment to the principal, or that a payment made by a third person shall operate as a payment by the principal, it must be shown that the person receiving or making the payment was an agent for that purpose, or that his acts were understandingly ratified by the principal; and, unless the evidence to that end is legally sufficient, the question should not be submitted to the jury.²

¹ *Taylor v. Hendrie*, 8 Nev. 243. See also *Fletcher v. Updike*, 3 Hun (N. Y.), 350, where a claim presented by a wife twenty-two years after the receipt by her deceased husband of the avails of her separate estate was held to be barred, and that a promise to pay the same, made to any person other than the wife or her duly authorized agent, would not operate to remove the statutory bar.

² In *Harding v. Edgecumbe*, 6 H. & N. 872, the defendant, in order to obtain money, gave a note to H., a customer of the plaintiffs, who were bankers. H. indorsed the note to the plaintiffs on obtaining the money which he was debited by them. The defendant was debited with the money by H., and H. had paid the interest on the note to the plaintiffs within six years; and upon this proof it was claimed that the statute was saved in favor of the plaintiffs. But the court held that there was no proof that H. was agent for the defendant for the purpose of paying the interest, and nonsuited the plaintiffs, and this judgment was sustained in Exchequer. Upon this question MARTIN, B., said: "I think this is a very clear case indeed. The declaration is on a promissory note by the defendant, payable to the order of John Hamlyn, and I have no doubt that in one sense Hamlyn was the agent of Edgecumbe for the purpose of getting this money; that is, Edgecumbe was the party who wanted the money, and he gave Hamlyn this promissory note to enable him to raise it, and thereupon he dealt with it, as I have no doubt Edgecumbe meant him to deal with it: he went to a bank to get the money. Therefore, he was the agent for that pur-

pose, but I apprehend, on the evidence, for that purpose alone; that all he did was as a man who went to the bank and got a promissory note discounted; and the parties to that note, other than himself, would be responsible only on an express contract, and that contract was the promissory note; and I have no doubt there is a legal liability on Edgecumbe the moment that note was discounted by the bank for Hamlyn; but it was Edgecumbe's own liability. If it were necessary to make out a liability as against Hamlyn, who was the payee and indorser of the note, it might become money lent to him to be carried to his account; but it can be no money lent to Edgecumbe. His liability is only on the note, and to that extent I think Hamlyn was the agent of Edgecumbe; but Hamlyn was not Edgecumbe's agent to pay interest. There is nothing in the transaction to show that he was authorized by Edgecumbe to make an agreement to pay interest on account so as to make a payment of interest by Hamlyn a payment by Edgecumbe, and to bring the case within the common law, assisted by Lord Tenterden's act, and make it a promise to pay: even if there had been such an agreement, it was all put an end to by the accounts. It was in evidence — and that makes the transaction perfectly clear — that Edgecumbe wanted some money, £180, to be paid into the Devon and Cornwall Bank, in order to meet a bill, and it is said that thereupon this note was given by Edgecumbe to Hamlyn, to enable him to go and get the money, which he did get; and on the 28th of January, 1852, an account is furnished, whereby it appears that the £180, together with 7s. 6d.

SEC. 104. Principle and Requisites of an Acknowledgment by Part Payment. — The principle upon which a part payment of principal or interest by a debtor will prevent his availing himself of the bar of the statute is, that such a payment amounts to an acknowledgment of the debt; and from an absolute acknowledgment, as we have seen, the law implies a new promise founded on an old consideration to pay.¹ In a

banker's commission, and 9s. 11d. interest, was paid to Hamlyn on the 23d of October, 1851, by means of a sum which he obtained from a building society, and the consequence as between Hamlyn and Edgecumbe is, that Edgecumbe had then paid this note, and it was the duty of Hamlyn to have gone and redeemed the note, and taken it up; and if there had been any authority to pay interest, which I do not think there ever was, that would clearly have been revoked by this; because, Hamlyn having been paid the money by Edgecumbe, there would be no authority afterwards for him to go and pay interest on a debt that did not exist. Therefore it is perfectly clear, that as the mere discounting of a bill, and getting the money from the banker, gives no authority to pay interest, and that after the 28th of January, 1852, any authority to pay was revoked, and the action being brought more than six years afterwards, the statute of limitations is a perfect answer; and as to that letter, I agree entirely with my Lord, that there is no obligation upon a man to answer a letter. I may write to a man to say he owes me £10,000; that is not a proof of liability. There is no obligation upon him to write an answer."

WATSON, B., said: "I am entirely of the same opinion. In the first place, it is necessary to prove a promise within six years, and that must be done in writing, under Lord Tenterden's act; and there is here no pretence of a writing. Then, was there payment of interest by the defendant within six years? Up to a certain point in the case, it might be left open whether there was or not; still, there is no evidence to go to the jury of agency. As soon as ever the account was put in, that was utterly destructive of any case, because it shows that from the 23d of October, 1851, as between Hamlyn and the defendant, that account was settled, and Hamlyn was using the promissory note to

bolster up his account with the bankers. And to say that was a promise to pay within six years is not correct. It is a most conclusive promise that he would not pay, according to my view of the case; and so far from there not being any evidence of a promise, I think there is direct evidence to the contrary."

CHANNELL, B., said: "I am also of opinion that this rule should be discharged. The nonsuit was clearly right. Unless there was a payment by the defendant himself or by his authorized agent within six years prior to the commencement of the action, that is a payment of interest. It is not pretended that there was any payment by the defendant, and I am clearly of opinion the payment of interest by Hamlyn was not a payment in the character of agent of the defendant. It is unnecessary, I think, to consider whether there was any evidence at any one time, and for some purpose, that Hamlyn was the agent of the defendant Edgecumbe, and I am clearly of opinion that no agency arose to the extent of authorizing Hamlyn to make a payment on account of Edgecumbe: a payment of interest to keep the liability alive, by reason of the fact of his being the holder of a promissory note, but of which Edgecumbe was the maker. The plaintiffs chose to put in the account; and it appears clearly on the 28th of January, 1852, all liability on the part of Edgecumbe towards Hamlyn has been discharged, and it seems to me a violent inference to draw, that after that had been discharged Edgecumbe authorized Hamlyn to act in any way as his agent in the matter. If Hamlyn had sued Edgecumbe on the note, he would have had an abundant answer, and I cannot conceive, after the liability of Edgecumbe was released, that he authorized Hamlyn to act as his agent to keep the debt alive."

¹ English v. Wathen, 8 Bush (Ky.) 387; Bealy v. Greenslade, 2 Cr. & J. 61;

leading English case upon this question¹ the requisites of an acknowledgment by part payment are laid down as follows: "In order to take a case out of the statute of limitations by a part payment, it must appear in the first place that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action was brought; and in the third place it is necessary to show that the payment was made as a part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is that it admits a greater debt to be due at the time of part payment." It must also appear that the payment was made before the action was brought.²

SEC. 105. Effect of Part Payment of Principal or Interest.—Questions have been raised how far a payment of principal implies a

Purdon v. Purdon, 10 M. & W. 562. A part payment suspends the statute, and starts it anew from the date of such payment. *Thorn v. Moore*, 21 Iowa, 285; *Strong v. M'Connell*, 5 Vt. 338; *Dyer v. Walker*, 54 Me. 18; *Hicks v. Lusk*, 19 Ark. 692; *Real Estate Bank v. Hartfield*, 5 id. 551; *Burr v. Williams*, 20 id. 171; *Joslyn v. Smith*, 13 Vt. 353; *Tillinghast v. Nourse*, 14 Ga. 641; *Turner v. Ross*, 1 R. I. 88; *Balcom v. Richards*, 6 Cush. (Mass.) 360; *Partlow v. Singer*, 2 Oregon, 307; *M'Gehee v. Greer*, 7 Port. (Ala.) 537; *Biscoe v. Stone*, 11 Ark. 39; *Chapman v. Boyce*, 16 N. H. 237; *Eaton v. Gillet*, 17 Wis. 435; *Walton v. Robinson*, 5 Ired. (N. C.) L. 341; *Smith v. Simms*, 9 Ga. 418; *Bridgeton v. Jones*, 34 Mo. 471; *Palmer v. Andrews*, 1 McAl. (U. S. C. C.) 491; *Hart v. Holly*, 18 Ga. 378; *McLaren v. McMartin*, 36 N. Y. 88; *Barron v. Kennedy*, 17 Cal. 574; *Whipple v. Stevens*, 22 N. H. 219; *Carshore v. Huyck*, 6 Barb. (N. Y.) 583. Payments on a bond and mortgage, and written acknowledgments of the amount due thereon within twenty years, repel the presumption of payment under the New York statute. *Carll v. Hart*, 15 Barb. (N. Y.) 565.

¹ *Tippets v. Heane*, 1 C. M. & R. 252; *Smith v. Simms*, 9 Ga. 418; *Rucker v. Frazier*, 4 Strobb. (S. C.) 93; *Carshore v. Huyck*, 6 Barb. (N. Y.) 583; *Sander-son v. Milton Stage Co.*, 18 Vt. 107. Payment of a judgment recovered for interest on a note is not sufficient to take the principal out of the statute. *Morgan v. Rowland*, L. R. 7 Q. B. 493.

² Part payment after action brought

does not remove the statute bar. *Bateman v. Pindar*, 2 G. & D. 790. But under the old theory the rule was otherwise. *Love v. Hackett*, 6 Ga. 486. In *Sweet v. Hentig*, 24 Kan. 84, the court held that a mere promise to give credit for a payment previously made is not sufficient. Thus, in that case the plaintiff, in 1874, was an accommodation indorser upon a note belonging to defendant. The maker was insolvent. Suit was brought. Plaintiff interposed no answer. Upon request of defendant, plaintiff, pending the suit, paid several hundred dollars upon defendant's promise to credit it on the claim, and take judgment for the balance only. Notwithstanding this, defendant took judgment for the face of the paper, of which fact plaintiff soon had knowledge. Calling defendant's attention thereto, he promised to correct the error and allow the payment on the final settlement of the judgment. Several payments were made from time to time, and this promise frequently repeated, but no correction was ever made. Defendant was the attorney of a company of which plaintiff was president. They occupied the same office and had intimate personal and business relations, in the latter of which defendant was plaintiff's confidential adviser. After over four years had passed, defendant refused to credit the judgment with this prior payment, and demanded the full amount due upon its face. Held, in an action brought by plaintiff to compel the credit of this amount and restrain the collection of the judgment therefor, that the statute of limitations was a bar to any relief.

promise to pay interest, and *vice versa*. On this point it may be noticed that, as a rule, a debt is composed of principal and interest, and upon all interest-bearing claims the interest is a part of the debt as fast as it accrues, and unless when a payment is made upon the principal debt the debtor expressly disavows the interest, the latter is thereby saved from the operation of the statute, as well as the principal, and payment of interest is consequently a part payment of the whole debt;¹ and this reasoning is equally applicable to the converse case. In an English case before referred to,² PARKE, B., observes that payment of interest, it is true, does not necessarily prove that the principal money is due, but that it is evidence of it. And it may be said that, unless at the time of its payment the debtor expressly restricts its application, and disavows the principal debt, it is conclusive.³ But under the rule that a simple contract cannot coexist with one under seal, unless one is intended to be simply collateral to the other, it is held that the mere payment of interest on a single bill barred by the statute is not sufficient to support assumpsit for the balance due thereon, or to interrupt the statute as to the sealed instrument.⁴ The rule is that a partial payment on a debt, whether of principal or interest, before it becomes due, is *prima facie* evidence of an acknowledgment that the residue is unpaid, and suspends the running of the statute from that date,⁵ and such

¹ Bealy v. Greenslade, 2 Cr. & J. 61 ; Sigourney v. Drury, 14 Pick. (Mass.) 387 ; Wyatt v. Hodson, 8 Bing. 309 ; Barrow v. Kennedy, 17 Cal. 574 ; Bradfield v. Tupper, 7 Eng. L. & Eq. 541 ; Freyburg v. Osgood, 20 Me. 176 ; Walton v. Robinson, 5 Ired. (N. C.) 341 ; Conwell v. Buchanan, 7 Blackf. (Ind.) 537 ; Sanford v. Hayes, 19 Conn. 591 ; Worthington v. Grimsditch, 10 Jur. 26.

² Purdon v. Purdon, *ante*.

³ Rich v. Niagara Savings Bank, 3 Hun (N. Y.), 481 ; Marcellin v. Creditors, 21 La. An. 423.

⁴ Leonard v. Hughlett, 41 Md. 380.

⁵ English v. Wathen, 9 Bush (Ky.), 387.

In *Denise v. Denise*, 110 N. Y. 562, it was held that a claim for services rendered for many years under an agreement to pay a certain sum per year is an entire claim, and a payment thereon takes the entire balance out of the operation of the statute of limitations.

In *re Consalus*, 95 N. Y. 340, where after the making of a loan, a promissory note was given by the borrower to the lender for the sum loaned, under an agreement that the former should pay more than lawful in-

terest, it was held, that while the defence of usury was good as against the note, the lender was entitled, in the absence of evidence that the loan was made originally upon a usurious agreement, to recover the sum loaned with lawful interest, deducting therefrom payment of interest which had been made at the usurious rate agreed upon.

The statute of limitations was set up as a bar to a claim for the original loan. It was held that the payment of interest, although made and indorsed upon the usurious note, was to be considered as made for the money originally loaned, and might be resorted to, to take the case out of the statute.

In the account filed upon the accounting of an executor, he charged himself with a note given by him to his testatrix, but credited himself with the amount thereof on the ground that it was void for usury. Objections were filed to this credit. Evidence was given showing that the note was made under a usurious agreement, but for money previously loaned, and no proof was made that the original loan was usurious. It was held that the executor was properly charged with the amount of

payment may be proved by parol.¹ It follows, therefore, that the implication of a promise derived from part payment of principal or interest is liable to be rebutted, and will not take the case out of the statute, unless made under circumstances which do not negative the implied promise to pay the residue. Thus, where a person, on being applied to for interest, paid a sovereign, and said he owed the money but would not pay it, it was held not to amount to an acknowledgment, subject to the question for the jury to decide whether the debtor seriously intended to refuse payment, or spoke only in jest.² So where a

the original loan, and lawful interest thereon less payments; that it was not necessary to state the charge in the objections filed to the account. The provision of the statute abolishing the common law rule under which the appointment of a debtor as executor by his creditor discharges the debt, and making the executor liable for "any just claim" the testator had against him, "as for so much money in his hands," includes an indebtedness of a firm of which the executor is a member; and the same should be included in the inventory and charged to the executor.

In *Gilbert v. Comstock*, 93 N. Y. 484, the court held that a claim was presented for the board of the testatrix from 1863 to her death in February, 1879, with interest from the expiration of each year. It appeared that a payment in part was made by the testatrix in November, 1875. It was held that the claim was of a character to which the statute of limitations might attach; but that the payment operated as an admission and renewal of liability for whatever was unpaid for six years prior thereto; and that a decree of the surrogate limiting the recovery to six years prior to the death of the testatrix was error.

Prior to the going into effect of the code, a contestant of a claim presented by an executor against the estate was not required to present a written answer or formal objections; the claim was open to any answer of defence, and was subject to be defeated if at the testator's death the statute of limitations had run against it.

¹ *Carshore v. Huyck*, 6 Barb. (N. Y.) 583; *Bank of Utica v. Ballou*, 49 N. Y. 155; *Comm'rs of Leavenworth v. Higginbotham*, 17 Kan. 62.

² *Wainman v. Kynman*, 1 Ex. 118. The mere fact of payment does not necessarily take the case out of the statute

where there are words spoken at the time that indicate that the debtor did not admit any balance to be due, and it is for the jury to say whether the debtor did or did not intend to refuse payment of the balance. In *Buildon v. Walton*, 1 Exch. 617, in an action by an executor for money lent by his testatrix to the defendant more than six years before the commencement of the suit, to which there was a plea of the statute of limitations, it was proved that within six years before the commencement of the suit the plaintiff filed a bill against the defendant for a discovery and account, and the defendant in his answer admitted the payment by him to the testatrix of half-yearly payments of £8 10s. each down to a period within the six years, but alleged that they were paid, not as interest upon a debt, but by way of annuity for the life of the testatrix, in pursuance of an agreement made between them at a period when the testatrix gave the defendant a sum of £340. It was held that the jury were at liberty to reject the latter part of the statement, and that the answer might be construed by them merely as admitting the payment of the money, and that the appropriation of it, as interest upon the debt sued upon, might be proved by other evidence. WILDE, C. J.: "In the course of the argument many observations were made on the one side and the other upon the case of *Willis v. Newham*, 8 Y. & J. 518, in which it was held that a verbal acknowledgment of part payment of a debt within six years would not, after 9 Geo. IV. c. 14, be an answer to a plea of the statute of limitations; but it seems to us quite unnecessary to express any opinion on that point; in reality there is no question here upon the 9 Geo. IV. c. 14. The defendant has made no admission by words only, not contained

party revives a debt barred by the statute by paying it into court, and at the same time refuses to pay interest upon it, the payment of the

in a writing signed by him ; whatever admission he has made was made in writing, signed and sworn to by him, and the true question is, what did he admit by that writing? For the purpose of this argument it may be assumed that the acknowledgment of a payment, as well as any other acknowledgment, must be in writing, signed by the party ; and we agree with Mr. Peacock that the written admission by the defendant must be construed by the court ; and we think that the plain meaning of it is, that the defendant admits having paid £8 10s. half-yearly to Elizabeth Craven down to December, 1842, but asserts that such payment was made by way of annuity, and not as interest on a debt. We also agree with Mr. Peacock that the whole admission must be laid before the jury as one entire writing ; but we are also of opinion that the jury were not bound to believe the whole of it, — they might believe the fact of £8 10s. being paid half-yearly, but reject the residue, and infer from the other evidence in the case that the payments were made for interest upon a debt. If the admission had been merely that the defendant had paid the sum of £8 10s. half-yearly, without adding that it was appropriated to any particular account, there can be no doubt that the jury might have inferred from the evidence that a debt existed, and that interest was paid down to a certain period, that the subsequent payments admitted to have been made were also for interest. In *Waters v. Tompkins*, 2 C. M. & R. 723, it was held that where the fact of payment of a sum of money is proved, the appropriation of it may be shown by other evidence, even by a verbal statement. Here the fact of payment was proved by an admission in writing, and of the appropriation there was sufficient evidence to be left to the jury. The only question is, whether the assertion of the defendant respecting the appropriation was conclusive. If the payments had been accompanied by that assertion they would have been qualified by it, and could not have been treated as payments of interest on a debt ; but here there is an admission of a

bygone act, viz., payment, and an assertion respecting it, which may or may not be true. It is no part of the act, but only what the defendant chooses to say respecting it. We think, therefore, that although that assertion must be admitted as evidence, the jury ought to have been allowed to contrast it with the other evidence in the case, and to decide whether the payments admitted were for interest or not ; and inasmuch as that other evidence was withdrawn from their consideration, and they were directed to find for the defendant, there must be a *venire de novo*."

The interpretation given to Stat. 9 Geo. IV. c. 19, in *Willis v. Newham*, *supra*, was followed in several subsequent decisions, *Maghee v. O'Neil*, 7 M. & W. 531 ; *Bayley v. Ashton*, 4 P. & D. 214 ; although not without an intimation that its authority was doubtful, and might be set aside by a court of error ; and it has been finally overruled by the Exchequer Chamber in *Chase v. Jones*, 6 Exch. 573. It had previously been held in *Williams v. Godley*, 9 Met. (Mass.) 482, where the same point arose under the Revised Statutes of Massachusetts, which contained a provision similar to the 9 Geo. IV., that as a writing is not made necessary to the proof of a part payment, it may be established by the admissions of the defendant, although such admissions are no longer admissible as a direct acknowledgment of the debt. The same construction has been given to a similar legislative enactment by the courts of Maine, *Sibley v. Lambert*, 30 Me. 253 ; and in Connecticut, in *Beardsley v. Hall*, 36 Conn. 270, it was held that such admissions might be proved although made on Sunday. And as an admission of payment is less likely to be misconstrued or misstated than an admission of the debt itself, there is no reason to question the soundness of this interpretation. The statute law of Mississippi, however, goes further, and renders a payment however proved insufficient, without an express promise. *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663 ; *Davidson v. Marshall*, 5 id. 564. And such is also the case in Nevada.

It was held in *Eastwood v. Saville*,

principal does not revive the claim for interest.¹ A payment made upon a note or other obligation, before the statute has run thereon, suspends the operation of the statute from that date, and starts it afresh, the former time being stricken out;² and a payment made after the

9 M. & W. 618, while *Willis v. Newham* was still law, and on its authority, that an indorsement of part payment on the back of the instrument on which suit was brought was not sufficient to take the case out of the statute, even when in the handwriting of the defendant, unless it was also signed by him. It is, however, well settled in most of the States of this country, where the statute does not otherwise expressly provide, on general principles, as it was in England before the passage of the 9 George IV., that an indorsement on a note in reduction of the debt may be submitted to the jury as a recognition of its existence, whether such indorsement be made by the plaintiff or the defendant; in the latter case, as an admission of the fact which it sets forth, *Porter v. Blood*, 5 Pick. (Mass.) 54; *Jones v. Jones*, 21 N. H. 219, and in the former, as an entry made against interest, and consequently admissible in favor of, as well as against, the person by whom it is made, *Roseboom v. Billington*, 17 Johns. (N. Y.) 182; *Clapp v. Ingersoll*, 11 Me. 83; *Coffin v. Buckman*, 12 id. 471; *The Trustees v. Osgood*, 12 id. 176; *Adams v. Seitzinger*, 1 W. & S. (Penn.) 243; *The State Bank v. Wood*, 5 Ark. 641; *Wood v. Wylks*, 5 id. 754; *Bradley v. James*, 13 C. B. 822; *Concklin v. Pearson*, 1 Rich. (S. C.) 391. In order, however, to give such an indorsement by the plaintiff the character of an entry against interest, it must appear to have been made before the bar of the statute attached to the instrument, *Cremer's Estate*, 5 W. & S. 331; *Howe v. Hathaway*, 20 Me. 345; *Smith v. Simmons*, 9 Ga. 418; *Alston v. The State Bank*, 4 Ark. 455; for otherwise he would be able to manufacture evidence, *Connelly v. Pierson*, 4 Ill. 108; *Whitney v. Bigelow*, 4 Pick. (Mass.) 113. That part payment is only *prima facie* evidence, and may be rebutted, see *Aldrich v. Morse*, 28 Vt. 642; *Ayer v. Hawkins*, 19 id. 28; *State Bank v. Moody*, 10 Ark. 638; *Arnold v. Downing*, 11 Barb. (N. Y.) 554; *Jewett v. Petit*, 4 Mich. 508.

¹ *Collyer v. Willcock*, 4 Bing. 313.

And see *Hollis v. Palmer*, 2 Bing. N. C. 713, where a payment of interest was held not to revive the principal under a peculiar state of the pleadings. A part payment, accompanied with a denial that more is due, will not take the balance out of the statute. *United States v. Wilder*, 13 Wall. (U. S.) 254. Payment of a promissory note "payable three months after demand" was sought to be enforced by its holder. The note was indorsed with payment of two instalments of interests, but no interest has since been paid during a period of upwards of twenty years. Held, that payment of interest was not evidence that a demand for payment of the principal had been made so as to make time run against the holder of the note under the statute of limitations, and that the fact that more than twenty years had elapsed without payment was not a fact from which the court could presume satisfaction of the note, in the absence of any demand having been made. *Brown v. Rutherford*, 42 L. T. Rep. N. S. 659.

² In *Nelson v. D'Armand*, 13 La. An. 294, where an obligation was payable by instalments, and all the instalments were due when the debtor made a payment, without directing on which instalment the credit was to be given, it was held that the payment must be deemed to have been made in part payment of all, and consequently that prescription was stopped as to all, and started anew from that date.

De Camp v. McIntire, 115 N. Y. 258.

Upon the trial of an action on a promissory note a motion for a non-suit was made on the ground that the note in suit was barred by the statute of limitations. The plaintiff asked leave to amend his complaint by substituting as his cause of action a claim for lumber sold and delivered, which he alleged was the original consideration of the note. An order was thereupon entered, which provided that on payment of certain costs plaintiff have leave to withdraw a juror and move at Special Term for leave to amend his complaint. In case said motion was denied, the order

statute has run has the same effect. The same rule prevails where a part payment of principal on interest is made by one joint debtor before the statute has run. In such case, the payment by one prevents the running of the statute as to all.¹ But in California it has been held that a payment made before the statute has run will not take the debt out of the operation of the statute.²

SEC. 106. Rebuttal of Implication. Indeterminate Debt. — Where a debtor at the time of making a payment to his creditor expressly states that it is not on account of the debt in question, it is not a part payment of such debt. But the statement must be made at the time, otherwise any declarations on the subject by the debtor are only evidence of more or less value as to the intention with which the payment was at the time made. Thus, where a defendant in a chancery suit had admitted payment by him of certain half-yearly payments down to a period within six years, but alleged in it that they were paid not as interest on a debt due by him to the plaintiff's testatrix,

provided that the complaint should be dismissed with costs, "as moved by the defendant." A juror was withdrawn, the plaintiff made the motion for leave to amend, which was denied and judgment was entered dismissing the complaint. Upon appeal by him, the General Term reversed the judgment for error in the rejection of the evidence. The defendant appealed to this court, claiming that the plaintiff could not review the judgment because he accepted its rendition as one of the conditions of the withdrawal of a juror and the permission granted him to move for an amendment of his complaint. Held, untenable; that the purpose of the order was to give plaintiff an opportunity for his motion, and if he failed, to put both parties in their original position; that the non-suit must be considered as if the trial had ended in that manner, and plaintiff had liberty to question the decision on appeal.

The complaint alleged that the note in suit was dated Nov. 10, 1877, that no part thereof had been paid "except \$278.11, on or about Feb. 12, 1880." The answer denied "that any sum was ever paid by the defendants, or either of them, as part payment of said note, or on account of it," and alleged that the plaintiff, for a good and valuable consideration, agreed, on or about Feb. 12, 1880, to accept said sum of \$278.11 in full satisfaction and discharge of the claim against the

defendants, "which was the sole and only consideration of said note." Upon trial the plaintiff put in evidence a receipt or agreement signed by defendants, dated Feb. 12, 1880, acknowledging the receipt from the plaintiff of the discharge of his mechanic's lien upon certain railroad property, the same to be returned within a reasonable time, or "in lieu thereof the sum of \$278.11 to be received in settlement and discharge of said lien from record, as against the owner, and to be credited on account of moneys paid on the claim as against the contractors . . . the balance to be settled hereafter." Plaintiff offered evidence showing that the claim referred to was the demand represented by the note. This was rejected. This was held error; that the sole issue presented by the pleading was as to whether the payment was made on the note or in accord and satisfaction; that the evidence bore directly upon that issue, as it tended to prove that the payment made was, in truth, a payment upon the debt which the note represented, the effect of which payment would be to save the bar of the statute.

¹ *Burgoon v. Bixler*, 55 Md. 384; *National Bank of Delaware v. Cotton*, Wis. S. C. Sept. 1881. *Schindel v. Gates*, 46 Md. 604; *Ellicott v. Nichols*, 7 Gill (Md.), 86.

² *Fairbanks v. Dawson*, 9 Cal. 89.

but by way of annuity and in pursuance of an arrangement made when a sum of money was given to the defendant, it was held that the jury were at liberty to reject the latter part of the statement, and that it might be taken simply as an acknowledgment of payment of money, and the fact that it was interest on the debt might be proved by other evidence.¹

It must be borne in mind, however, that where the debt is not for a definite amount, but the sum is indeterminate, it may be when a payment has been made that it has been made not as a part payment, but as a discharge of the whole in the intention of the payor, in which case, of course, no promise to pay the residue can be implied.²

SEC. 107. Payment into Court.—The payment of money into court will not revive the right to the residue, if any, of the debt, inasmuch as such payments are commonly made as payments of all that is admitted by the debtor to be due.³ The rule was formerly otherwise;⁴ but it is now settled that a payment of money into court only operates as an admission of a liability to the extent of the amount so paid.⁵ And now, under the modern theory as to the office and effect of these statutes, such a payment after action commenced would be too late.⁶

SEC. 108. Identity of Debt.—There must, of course, be reasonable evidence of the identity of the debt sued for with that on account of which the part payment has been made.⁷ Where, under an agreement, there are separate causes of action to recover two sums secured by the same bond, payment on account of one of such sums will not revive the debt as to the other sum.⁸ Where a payment appears to have been made on account of an existing debt, the jury are warranted in considering it as applied to the payment of the particular debt sued for, unless there is evidence of any other existing debt.

SEC. 109. Questions for the Jury.—The question whether a payment made by a debtor, who afterwards seeks to take advantage of the statute, was made on account of and in part payment of the particular debt is for the jury, subject, of course, to the direction of the court. In an English case,⁹ where there were two distinct debts due

¹ *Baildon v. Walton*, 1 Exch. 617.

² *Burn v. Boulton*, 2 C. B. 476; *Waugh v. Cope*, 6 M. & W. 824. Where a debtor transmitted a draft to his creditor, which was received by him, the debtor not making any allusion to the account, or of any debt whatever, it was held that it did not operate as a part payment, so as to remove the bar of the statute. *Hussey v. Burgwyn*, 8 Jones (N. C.) L. 385. Nor does a special payment have that effect. In order to make a payment or account effectual to save the entire account, it must be made generally. If it is made specifically to liquidate particular items, it will not take

other items out of the statute. *Peck v. New York, &c. Steamship Co.*, 5 Bosw. (N. Y.) 226.

³ *Long v. Greville*, 3 B. & C. 10; *Reid v. Dickons*, 5 B. & Ad. 499.

⁴ *Dyer v. Ashton*, 1 B. & C. 3.

⁵ *Kingham v. Robins*, 5 M. & W. 94; *Lechmere v. Fletcher*, 1 C. & M. 623; *Tattenhall v. Parkinson*, 2 M. & W. 752; *Reid v. Dickons*, *ante*; *Cox v. Parry*, 1 T. R. 464.

⁶ *Waters v. Tomkins*, 2 C. M. & R. 723.

⁷ *Ashlin v. Lee*, W. N. 1875, 42.

⁸ *Evans v. Davies*, 4 Ad. & El. 840.

⁹ *Burn v. Boulton*, 2 C. B. 485.

from the debtor, a general payment by him not specifically appropriated as a payment upon either claim was held to have no effect upon removing the statute bar as to either; and the same principle was adopted as to an acknowledgment in a Connecticut case, the gist of which is given elsewhere.¹ But in a later case in Connecticut,² where there were two distinct debts against the defendant, it was held that the question whether an acknowledgment was made with reference to a particular debt was for the jury; and the rule applies with equal force to an acknowledgment arising from a part payment.³ In a later English case,⁴ the doctrine of *Burn v. Boulton* was somewhat restricted, and was held applicable only in cases where the two debts are entirely distinct; and in such a case, where a payment is made by the debtor without any directions as to its application, the question as to whether it removed the statute bar as to either must depend upon the circumstances of the case,⁵ and that it was properly a question for the jury whether a payment so made was made generally on account of whatever might be due, and, if so, that both debts would be revived thereby.

SEC. 110. **General Rule as to Appropriation of Payments.** — Where a debtor makes a payment to a creditor to whom he is owing several distinct debts, the general rules as to the appropriation of the money are: 1st, That it shall be applied as the debtor directed at the time of payment, in accordance with the maxim, *quicquid solvitur secundum animun solventis*; ⁶ 2dly, that if the debtor does not direct as to its application, the creditor may do so at any time before judgment, under the maxim, *quicquid recipitur, recipitur in modum recipientis*; ⁷ and, 3dly,

¹ *Buckingham v. Smith*, 23 Conn. 453.

² *Cook v. Martin*, 29 Conn. 63.

³ See also *Bigelow v. Whitney*, 4 Pick. (Mass.) 112; *Buckingham v. Smith*, *ante*; *Coles v. Kelsey*, 2 Tex. 541; *Guy v. Sama*, 6 Gill (Md.), 87; *Shaw v. Newell*, 2 R. I. 264.

⁴ *Walker v. Butler*, 6 El. & Bl. 506.

⁵ See *Cook v. Martin*, *ante*.

⁶ *McKee v. Stroup*, 1 Rice (S. C.), 291; *Jackson v. Bailey*, 12 Ill. 159; *Sherwood v. Haight*, 26 Conn. 432; *Read v. Boardman*, 20 Pick. (Mass.) 441; *Treadwell v. Moore*, 34 Me. 112; *Semmes v. Boykin*, 27 Ga. 47; *Mitchell v. Dall*, 4 H. & G. (Md.) 159; *Martin v. Draher*, 5 Watts (Penn.), 544; *Pindall v. Bank of Marietta*, 10 Leigh (Va.), 484; *Wetherell v. Joy*, 40 Me. 325; *Black v. Schouler*, 2 McCord (S. C.), 292; *Calvert v. Carter*, 18 Md. 73; *Irwin v. Paulett*, 1 Kan. 418; *Taylor v. Sandiford*, 7 Wheat. (U. S.) 13; *Solomon v. Dreschler*, 4 Minn. 278; *Jones v. Williams*, 39 Wis. 300; *Whitaker v. Grover*, 54 Ga. 174;

Bonaffe v. Woodbury, 12 Pick. (Mass.) 463; *Levystein v. Whitman*, 59 Ala. 345; *Adams Exp. Co. v. Black*, 62 Ind. 128. But the appropriation must be made by the debtor at the time of payment, and he cannot, after the creditor has applied it, change the application of it. *Haynes v. Waite*, 15 Cal. 446; *Hill v. Southerland*, 1 Wash. (Va.) 128.

⁷ The rule, as stated in the text, is well established. *Sawyer v. Tappan*, 14 N. H. 352; *Bird v. Davis*, 14 N. J. Eq. 467; *Hargroves v. Cook*, 15 Ga. 321; *Bohe v. Stickney*, 36 Ala. 482; *Middleton v. Frame*, 21 Mo. 412; *Watt v. Hoch*, 25 Penn. St. 411; *United States v. Bradbury*, Dav. (U. S. C. C.) 146; *Logan v. Mason*, 6 W. & S. (Penn.) 9; *Johnson v. Johnson*, 30 Ga. 857; *Sickles v. Ayres*, 6 N. J. Eq. 29; *Holmes v. Pratt*, 34 Ga. 558; *Fargo v. Buell*, 21 Iowa, 292; *Crisler v. McCoy*, 33 Miss. 445; *Livermore v. Rand*, 26 N. H. 85; *Howland v. Rench*, 7 Blackf. (Ind.) 236. But where interest is due, the pay-

if neither of them apply the payment to any particular claim, the law will apply it to the oldest debt, or as may be just.¹ The creditor may appropriate a payment not appropriated by the debtor to a debt barred by the statute,² or it seems, according to some of the cases, that where there are several notes barred by the statute, and a general payment is made, he may so appropriate the money as to take them all out of the statute.³ But in New York, as will be seen by the cases from that

ment must be first applied to the liquidation of it. *Johnson v. Robbins*, 20 La. An. 569; *Mills v. Saunders*, 4 Neb. 190. But if there is anything in the circumstances attending the payment or the debt itself, from which the intention of the debtor may be implied, his intention must prevail. *Howland v. Rensch*, 7 Blackf. (Ind.) 236; *West Branch Bank v. Moorehead*, 5 W. & S. (Penn.) 542; *McIntyre v. Cross*, 18 Vt. 451; *Cass v. McDonald*, 39 id. 65.

¹ *Leef v. Goodwin*, Taney, 460; *Plummer v. Erskine*, 58 Me. 59; *Mueller v. Wiebracht*, 47 Mo. 468; *Matthews v. Switzler*, 46 id. 301; *Bean v. Brown*, 54 N. H. 395; *King v. Andrews*, 30 Ind. 429; *Nutall v. Browning*, 5 Bush (Ky.), 11; *McDaniel v. Barnes*, id. 183; *Trullinger v. Kofoed*, 7 Oregon, 228; *Harding v. Tift*, 75 N. Y. 461. The debtor's intentions, if not expressed, cannot be considered. *Brice v. Hamilton*, 12 S. C. 32. But in *Witowsky v. Reid*, 82 N. C. 116, it was held that his intention might be proved by directions given either previously or subsequently. But this rule is inconsistent with the general rule, and is not sustainable as to directions given by the debtor after the payment has been made; and a contrary doctrine was held in *Mahawie Bank v. Peck*, 127 Mass. 298. After the creditor has made the application he cannot change it, even at the request of the debtor, if other parties are affected thereby. *Harding v. Wormley*, 8 Baxter (Tenn.), 578. On the general proposition stated in the text, and sustaining it, see *Hill v. Robbins*, 22 Mich. 475; *Champernos v. Fort*, 45 Wis. 355; *Howard v. McCall*, 21 Gratt. (Va.) 205; *Waterman v. Younger*, 26 Ark. 513; *Genin v. Ingersoll*, 11 W. Va. 549; *St. Albans v. Failey*, 46 Vt. 448; *Langdon v. Bowen*, id. 512; *Whittaker v. Grover*, 54 Ga. 174; *Jones v. Williams*, 39 Wis. 300.

² *Harrison v. Davies*, 23 La. An. 216.

If payments by a debtor to a creditor on account of his indebtedness generally, which consists of various promissory notes payable at various times, are made before one of the notes is barred by the statute of limitations, they may be applied afterwards by the creditor to that note, and when so applied take effect from their respective dates and not from the date of the application. *Ramsay v. Warner*, 97 Mass. 8. A payment on account, in order to take the whole account out of the statute, must be made generally. A payment, made to be specifically applied to particular items, will not take the other items out of the statute. *Peck v. New York, &c. Steamship Co.*, 5 Bosw. (N. Y.) 226. Where the whole of the plaintiff's claim in the suit was barred by the statute, except \$3.98, and the defendant gives evidence of the payment of \$6.29, on a verbal order to J. T. D., a few days before suit brought, it is competent for him to prove to prevent the claim from being taken out of the statute, that at the time he made the payment he declared that he "owed the plaintiff nothing," but that he preferred paying it to having any further trouble about it. *Davis v. Amy*, 2 Grant's Cas. (Penn.) 412. The holder of a promissory note delivered it to his creditor as collateral security for a mutual and open account current, with the understanding that any sum collected on it should be applied to the account; and afterwards an agent of the creditor collected and paid to him a dividend on the note from the estate of the maker in insolvency, which payment, on the day thereof, the creditor applied to the account. It was held that the statute did not begin to run on the account until after that day. *Whipple v. Blackington*, 97 Mass. 476.

³ *Jackson v. Burke*, 1 Dill. (U. S. C. C.) 311; *Mills v. Fowkes*, 5 Bing. N. C. 455. But see *Reed v. Hurd*, 7 Wend. (N. Y.)

State cited in the last note, the creditor cannot make such an application of a general payment, upon a debt barred by the statute, unless the debtor consents thereto, and it is presumed that the money was paid upon the debts not barred until the contrary is shown; and in a Vermont case, where the plaintiff held notes against the defendant, which were dated more than six years before the commencement of his action, and the jury found the fact that within six years the defendant made a general payment to the plaintiff on account of some one or more of the notes, or of the indebtedness manifested by them, it was held that a promise of further payment must be implied. It is not essential that the defendant should have recollected the giving of the notes at the time of making the payment, if he was aware of the indebtedness for which they were given, and acted with reference to it; and if a debtor owing several demands to his creditor makes a general payment, and neglects to direct its application, the right of designation belongs to the creditor; yet he must make an application to which the debtor could not justly or reasonably object. Therefore, where the demands consisted of three notes, all of which were barred by the statute, and the debtor made a general payment, it was held that the creditor might apply it upon which note he pleased, and that he might indorse it, if he so chose, upon the largest note, although it was subsequent in date to the others, and that the effect would be to take the note upon which the application was made out of the statute of limitations; but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute.¹ The right to make the appropriation, as stated, belongs in the first instance to the debtor; but if, at the time, he neglects to make it, the right passes to the creditor, and the debtor cannot afterwards claim it.² But the rule only applies to lawful debts.³

408; *Heath v. Grinnell*, 61 Barb. (N. Y.) 190, where it was held that the creditor could not apply a general payment in discharge of a debt barred by the statute, without the debtor's assent.

¹ *Ayer v. Hawkins*, 19 Vt. 26.

A general payment made by a debtor to a creditor, where there are two or more obligations, one of which is barred by the statute, may be applied by the creditor upon the obligation which is barred, and according to the Vermont cases, *Sanborn v. Cole*, 14 L. R. A. (Vt.) 208; *Robie v. Briggs*, 59 Vt. 448; *Wheeler v. House*, 27 Vt. 735, removes the statutory bar as to the entire debt, and this rule has been adopted in Missouri. *Beck v. Haas*, 31 Mo. App. 180. But in England, while it is held that the creditor may apply a gen-

eral payment to liquidate a debt against which the statute has run, yet such application does not remove the bar as to the balance of the debt, *Mills v. Fawkes*, 5 Bing. N. C. 455, *Nash v. Hodgson*, 6 D. & G. M. & G. 474., and such also is the rule in Massachusetts and Maine, *Blake v. Sawyer*, 83 Me. 129; *Pond v. Williams*, 1 Gray (Mass.), 630; *Ramsay v. Warner*, 97 Mass. 13.

² *Bell v. Radcliff*, 32 Ark. 645. If before payment is made the debtor expresses a wish as to its application, such an expression involves a direction by him, and he is entitled to the benefit of the application requested. *Hansen v. Rounsavell*, 74 Ill. 238.

³ *Duncan v. Helm*, 22 La. An. 418; *McCausland v. Ralston*, 12 Nev. 195;

In the case of running accounts, in the absence of special circumstances which ought to control, the payment will be applied to extinguish the debts according to priority of time.¹ In England, it has been held that where there are several debts, some barred and some not, the effect of the payment of principal generally will be to take any debt not then barred out of the statute, but will not revive a debt which is barred; and the inference will be that the payment is to be attributed to those not barred.² Thus, in the case last referred to there were three notes executed, two of which were barred and one was not, and a payment was made of a small sum on account generally; it was held the payment did not revive the remedy on the two older debts, but did prevent time from continuing to run in the case of the latter.³ Where there are two distinct debts, it seems that an unappropriated payment may revive neither.⁴ If there are several distinct debts, and a payment is made

Storer v. Haskell, 50 Vt. 341. But if the debtor directed or consented to the application of the payment on an illegal debt, the court will not interfere. *Feldman v. Gamble*, 26 N. J. Eq. 494.

¹ *Sprague v. Hazelwinkle*, 53 Ill. 419; *Moore v. Gray*, 22 La. An. 289; *Crompton v. Pratt*, 105 Mass. 255; *Allen v. Brown*, 39 Iowa, 330; *Worthley v. Emerson*, 116 Mass. 374; and even where a part of the items accrued before and a part after the defendant was discharged in bankruptcy, of which the creditor had no notice, does not change the rule, *Hill v. Robbins*, 22 Mich. 475.

² CRANWORTH, C., in *Nash v. Hodgson*, 6 De G. M. & G. 474.

³ *Nash v. Hodgson*, 1 Kay, 650; on appeal, 6 De G. M. & G. 474.

⁴ *Burn v. Boulton*, 2 C. B. 476. If two demands were due at the time of payment, so that it is doubtful to which the payment applied, such part payment will not remove the statute as to either. *Armistead v. Brooks*, 18 Ark. 521; *Burr v. Burr*, 26 Penn. St. 284. In *Nash v. Hodgson*, 6 De G. M. & G. 474, where there were three notes, upon two of which the statute had run, and a sum of money was paid on account of interest generally, but less than the amount due on the note not barred, it was held that the payment must attach to that note. And it seems that the payment cannot be distributed among all of them, so as to remove the statutory bar as to those upon which the statute has run, as in such cases it will be presumed that the payment was intended to apply to

the subsisting debt. *Lowery v. Gear*, 32 Ill. 332; *Pond v. Williams*, 1 Gray (Mass.), 630. But where there are several debts, none of which are barred, a general payment keeps on foot the debt upon which it is applied. *Ramsay v. Warner*, 97 Mass. 8; *Briggs v. Williams*, 2 Vt. 283; *Harker v. Conrad*, 12 S. & R. (Penn.) 301; *Starett v. Barber*, 20 Me. 457; *Oliver v. Phelps*, 20 N. J. L. 180; *Selleck v. Turnpike Co.*, 13 Conn. 453; *Robinson v. Doolittle*, 12 Vt. 246; *McFarland v. Lewis*, 3 Ill. 344; *White v. Trumbull*, 15 N. J. L. 315; *Callahan v. Boazman*, 21 Ala. 246; *Benny v. Rhoda*, 18 Mo. 147; *Proctor v. Marshall*, 18 Tex. 63; *Hamer v. Kirkwood*, 25 Miss. 95; *Thompson v. Phelan*, 22 N. H. 339. If money is paid on an account, and no specific application of it is made by either party, the law will apply it to the payment of the oldest items. *Harrison v. Johnson*, 27 Ala. 445; *Fairchild v. Holly*, 10 Conn. 175; *Shedd v. Wilson*, 21 Vt. 478; *Thurlow v. Gilmore*, 40 Me. 378; *Harrison v. Johnson*, 27 Ala. 445; *Horne v. Planters' Bank*, 32 Ga. 1. But if some items are due, and others not, the application must be made to those which are due. *Effinger v. Henderson*, 33 Miss. 449. If money is paid generally upon debts which are differently secured, the law will apply it in discharge of the debts for which the security is most precarious, *Chester v. Wheelwright*, 15 Conn. 562; *Baine v. Williams*, 18 Miss. 113; *Smith v. Wood*, 7 N. J. Eq. 74; *Bosley v. Porter*, 4 J. J. Mar. (Ky.) 621; *Gwinn v. Whittaker*, 1 H. & J. (Md.) 754; *State v. Thomas*, 11

without any direction as to how it shall be applied, and the creditor applies it at once to the payment of a debt which is barred, it will not take the balance of that debt out of the statute;¹ nor where there are several distinct notes or other obligations, which is a part of a series, will the payment of one remove the statute as to the others.²

SEC. 111. Oral Proof of Part Payment. — As previously stated, it was originally held in England that the evidence of part payment to avoid the statutes must be in writing, signed, it being considered that to allow a debt to be revived on any less strict evidence of a part payment was within the mischief of the act.³ But this doctrine, after being frequently questioned,⁴ was eventually overruled,⁵ and now a part payment for the purposes of the statute may be proved orally or otherwise, as any other fact; and the same rule prevails in this country, except in Nevada, where the statute requires evidence in writing, signed by the party charged.⁶

SEC. 112. Part Payment need not be in Money. — It is not necessary, for the purposes of the statute, that a part payment of principal or interest should be made in actual money. Thus, a payment in goods may be a sufficient part payment, and if parties to a bill of exchange agree that goods shall be supplied and taken accordingly, that amounts to a part payment.⁷ So the indorsement and delivery by the debtor of a note of a third party, payable at a future time, either in payment of, or as collateral security for, his indebtedness to another

Ired. (N. C.) L. 251; and if interest is due, the payments will first be applied in discharge of it, *Fadden v. Fortier*, 20 Ill. 509; *Hearn v. Cuthert*, 10 Tex. 216; *Lush v. Edgerton*, 18 Minn. 210; and the balance will be applied upon the principal as will be most beneficial to the creditor, *Estebene v. Estebene*, 5 La. An. 738; *Hampton v. Deane*, 4 Tex. 455; *Jencks v. Alexander*, 11 Paige (N. Y.) Ch. 619.

¹ *Pond v. Williams*, 1 Gray (Mass.), 630.

² *Brown v. Johnson*, 20 La. An. 486.

³ *Willis v. Newham*, 3 Y. & J. 518; *Trentham v. Deverill*, 3 Bing. N. C. 307; *Bayley v. Ashton*, 12 A. & E. 493; *Maghee v. O'Neill*, 7 M. & W. 631; *Eastwood v. Saville*, 9 id. 615.

⁴ See per LORD DENMAN in *Trentham v. Deverill*: "If I were now called on to put a construction upon the act, I should be of opinion that any proof of payment was sufficient;" and a similar remark of LORD ABINGER in *Maghee v. O'Neill*.

⁵ *Cleave v. Jones*, 6 Exch. 573. See *Edwards v. Janes*, 1 Kay & J. 534.

⁶ *Williams v. Godley*, 9 Met. (Mass.)

482; *Sibley v. Lambert*, 30 Me. 253. In *Shumate v. Williams*, 34 Ga. 245, the plaintiff, in order to save a note from the operation of the statute, relied upon certain indorsements made thereon in 1857, which was within the period of limitation, accompanied by parol proof that such payments were in fact made; but the court held that, under the statute requiring an acknowledgment in writing, signed, &c., such payments were not sufficient. See also *Waterman v. Burbank*, 8 Met. (Mass.) 352, where mere proof of an indorsement made by the payee was held not sufficient. Where a debt exists against a person, and it is conceded by the parties that part of it should be paid by another person, and that such part is really the debt of such person, the payment by such person of such part of the debt does not remove the statute bar as to the balance of the claim, as it is not a part payment of such debt, but only a payment of the debt of such third person. *Carlisle v. Morris*, 8 Ind. 421.

⁷ *Hart v. Nash*, 2 C. M. & R. 337.

has been held to operate as a payment sufficient to take the case out of the statute.¹ But where goods are delivered to a creditor to be sold, and the proceeds applied in liquidation of the debt as far as they will go, the goods must be sold, and the proceeds applied upon the debt within a reasonable time. Thus, where goods were pledged by the maker of a promissory note to the payee, with power to sell the same and apply the proceeds on the note, and the payee held the goods six years before he sold them and made the application on the note, it was held that the sale and application was not made in a reasonable time, and that the application of the proceeds of such sale on the note would not save it from the operation of the statute.² And the same rule is applicable where the note of a third person is given to a creditor as collateral, with instructions "to collect the same and apply the proceeds to the payment" of the note in suit. In such a case, if the creditor accepts the note, he takes it subject to the instructions; and as soon as the note is collected, the proceeds are to be applied upon the note at that time, and that proof of payment on the collateral note would operate as proof of payment on the note to which such collateral note was to be applied. But this was held subject to the exception that the creditor could not unreasonably delay the collection, and that, if he did, the proceeds could not be considered as applied upon the note in suit by the direction of the debtor.³ Where the note of a third person is given as collateral, the proceeds to be applied upon the principal note, the receipt of a dividend on the note takes the principal debt out of the

¹ *Smith v. Ryan*, 39 N. Y. Superior Ct. 489.

² *Porter v. Blood*, 5 Pick. (Mass.) 54. See also *Lyon v. State Bank*, 12 Ala. 508, where cotton was, with the consent of the sureties on a note, deposited as collateral thereto, with power to sell and apply the proceeds on the note; and although the cotton was sold, and the proceeds applied on the note after its maturity and before the statute had run thereon, it was held that it did not suspend the running of the statute as to the balance.

³ In *Haven v. Hathaway*, 20 Me. 345, in an action upon a note payable more than six years before the commencement of the action, it appeared that the defendant had delivered another note to the plaintiff, "to collect the same and apply the proceeds to the payment" of the note in suit, and the plaintiff had accepted it, it was held that he was bound to comply with these directions; that, as soon as he collected money upon it, he was obliged to consider it a payment of so much of the note in suit; and that proof of payment on the collateral

note would operate as proof of payment of the same sum on the note in suit. In a New York case, where, in October, 1855, H., who owed P. \$26.50 for a set of tombstones, made an agreement with S. that S. should pay P. for the stones upon their delivery, H. to credit S. with that sum upon a demand which he had against him; and P., being indebted to B. upon a promissory note dated Jan. 30, 1854, payable one day from date, agreed with B. that he might receive pay of S. for the stones, and apply the amount thereof upon the note, and P. thereupon delivered the stones to B., S. having previously consented that the parties might make this agreement; and having had notice that it was made, and having assented to it when B. took the stones to him, it was held that the effect of the transaction was to substitute S. in place of P. as debtor to B. for the price of the stones, and that it operated *in presenti* as a payment of such price upon the note. *Butts v. Perkins*, 41 Barb. (N. Y.) 509. *Turney v. Dodwell*, 3 El. & Bl. 136.

statute from the time of the receipt thereof.¹ If a check is given as collateral to a note, it does not operate as a payment until collected.² In all cases where goods or securities are given as collateral, with power to sell or collect, and apply the proceeds in liquidation of a debt, the power must be exercised within a reasonable time in view of the circumstances, or the application of the proceeds upon the debt will not save it from the operation of the statute,³ else in such cases, by unreasonable delay, a creditor could keep his debt on foot indefinitely. And generally it may be said that where a thing is received upon agreement in reduction of a debt, that is a payment sufficient to take the debt out of the statute.⁴ The giving of a note for interest accrued is a sufficient part payment,⁵ or a credit given therefor in account.⁶ In an English case,⁷ it was agreed between the plaintiff and defendant that the defendant, instead of paying interest due by him, should afford maintenance to the plaintiff's child, and it was held that the maintenance of the child amounted to a part payment. But notwithstanding the doctrine of these cases, under the rule that a payment must be made under such circumstances that a new promise can be implied to pay the balance of the debt, it is not believed that the application by the creditor of money received upon a collateral, whether with or without express authority from the debtor so to do, can have the effect to remove or suspend the operation of the statute, unless the debtor subsequently ratified and adopted the creditor's act, for the reason that, while the debtor may constitute the creditor his agent for the sale of the collateral, or the collection of the money due upon it, *he cannot authorize the creditor to make for him, to himself (the creditor) a new promise to pay the debt*; and this is, and necessarily must be the tendency of the later cases.⁸

SEC. 113. Test as to what amounts to Part Payment. — It is not necessary that either money or goods should actually pass, for payment may be made by settlement of account. "If two persons meet, and one says to the other, I owe you so much, and you owe me so much, but instead of an exchange of money they agree to settle the account by setting off one against the other, and that is done, that is a payment by settlement of account."⁹ So, too, a creditor may, by the consent of the debtor, give him a portion of the debt, and a credit

¹ Whipple v. Blackington, 97 Mass. 476. Either a payment in money, or giving security for a part or the whole of a debt is sufficient, Manderston v. Robertson, 4 M. & Ry. 410; Balch v. Onion, 4 Cush. (Mass.) 559; Whitney v. Bigelow, 4 Pick. (Mass.) 110; or giving a note as collateral, Ilsley v. Jewett, 2 Met. (Mass.) 168.

² Garden v. Bruce, L. R. 3 C. P. 300.

³ Porter v. Blood, *ante*; Haven v. Hathaway, *ante*.

⁴ Hooper v. Stevens, 4 A. & E. 71.

⁵ Wenman v. Mohawk Ins. Co., 13 Wend. (N. Y.) 267; Sigourney v. Wetherell, 6 Met. (Mass.) 558.

⁶ Smith v. Ludlow, 6 Johns. (N. Y.) 267.

⁷ Bodger v. Arch, 10 Exch. 333.

⁸ Brown v. Latham, 58 N. H. 30; Smith v. Ryan, 66 N. Y. 352; Harper v. Frailey, 53 id. 442.

⁹ Per POLLOCK, C. B., in Amos v. Smith, 1 H. & C. 238.

entered in pursuance thereof will be effectual as a part payment. Thus, in an English case,¹ after a debt due to the plaintiff by his son had been barred by the statute, the plaintiff, his son, and his son's wife had an interview, at which the interest due to the plaintiff was calculated. The plaintiff's son then put his hand into his pocket, as if to get out the money to pay it. The plaintiff stopped him, and, writing a receipt for the money, gave it to his son's wife, saying he would make a present of it to her. It was held, by a majority of the Court of Exchequer, **BRAMWELL, B.**, dissenting, that the transaction was sufficient to take the case out of the statute. The true test as to what transactions will amount to a part payment for the purposes of avoiding the statute appears from the judgment in the case last cited, as well as from other cases,² to be, that any facts which would prove a plea of payment of interest or principal in an action brought to recover either would amount to a payment sufficient to bar the statute.³ And **BRAMWELL, B.**, in dissenting from the opinion of the majority in the case last cited, did so on the ground that in his judgment the facts would not have supported such a plea of payment. So, if by agreement money is paid by a debtor on behalf of his creditor to a third person, that may be a sufficient part payment as between the debtor and creditor.⁴

SEC. 114. Part Payment by Bill or Note. — Where a debtor gives a bill or note on account of a debt, it operates as a part payment, even though it ultimately proves worthless. It may be said that payment, in the popular use of the term, is taken to include a giving and taking of a negotiable instrument on account of a debt, as well as a giving and taking it in satisfaction of a debt. A bill is conditional payment, and its immediate operation as an acknowledgment of a balance demand is not to be affected by its operation as a payment, being liable to be defeated at a future time; and even if it is worthless, the intention and the act by which it is evinced remain the same,⁵ and it operates as such an acknowledgment of the debt as removes the statute bar.

A question arises, when a bill or note is given in part payment of a debt, whether the part payment must be considered made at the time of the delivery of the bill, or of payment thereof. On this point it has been decided that when a debtor draws a bill of exchange to be applied in part payment of a debt, and the bill is paid when due by the drawee to the creditor, it operates as a part payment from the time of the delivery of the bill by the debtor, not from the time of the payment.⁶

¹ *Maber v. Maber*, L. R. 2 Exch. 153.

² *Bodger v. Arch*, 10 Exch. 333; *Amos v. Smith*, 1 H. & C. 238.

³ *Maber v. Maber*, L. R. 2 Exch. 153.

⁴ *Worthington v. Grimsditch*, 7 Q. B. 479.

⁵ *Turney v. Dodwell*, 8 El. & Bl. 136.

⁶ In *Irving v. Veitch*, 3 M. & W. 90, it was held that where a debtor draws a

bill of exchange, to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as part payment, to defeat the statute of limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. *Gowan v. Forster*, 3 B. & Ald. 507; *Smith v. Ryan*, 39 N. Y. Superior Ct. 489.

SEC. 115. Indorsements on Notes, etc. — Indorsements by a creditor on a bill or note admitting payments of interest or principal, if made before the debt was barred, were formerly, after the creditor's death, held to amount to sufficient evidence for the purpose of avoiding the plea of the statute; the principle of their admission as evidence being that they were acknowledgments against the interest of the person making them.¹ But indorsements made after the statute has run upon the claim afford no evidence whatever that the payment was made, because it is an act in furtherance of the interests of the creditor, and a person will not be permitted to make evidence for himself.² Therefore,

¹ *Higham v. Ridgway*, 10 East, 109; and in England, under Stat. 9 Geo. IV. c. 14, it is held that the provision that "no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said statutes," only applies to the case where there is nothing more than an indorsement or memorandum on the note or bill or other writing which constitutes the contract declared on. *Bradley v. James*, 13 C. B. 822. And it appears from the same case that the memoranda made against their own interest of dead persons in ledgers, account-books, and otherwise, may still be used as evidence for the purpose of removing the statute bar. *Addams v. Seitzinger*, 1 W. & S. (Penn.) 248; *Shaffer v. Shaffer*, 41 Penn. St. 51; *Coffin v. Bucknam*, 12 Me. 471; *Warren v. Granville*, 2 Strange, 1129; *Bruce v. Robson*, 15 East, 32; *Higham v. Ridgway*, 10 id. 1091. The mere fact of indorsements of payments within six years, in the handwriting of the payee, is not competent evidence to prove such payments. *Davidson v. Delano*, 11 Allen (Mass.), 523. Thus, in an English case, the defendant, in order to obtain an advance of money, gave a promissory note to H., a customer of the plaintiffs', who were bankers. H. indorsed the note to the plaintiffs on obtaining the money, with which he was debited by them. The defendant was debited by H. with the amount, and H. had paid interest on the note to the plaintiffs within six years. It was held that these payments did not take the

note out of the statute as against the defendant, H. not being his agent for that purpose. *Harding v. Edgecumbe*, 4 H. & N. 872. The bar of the statute of limitations is not repelled by the transmission of a draft by the debtor and its receipt by the creditor within the three years, the former not making any allusion to or recognition of the account of any debt whatever. *Hussey v. Burgwyn*, 6 Jones (N. C.) L. 385. A credit indorsed upon a bond at a time not suspicious, by an officer of the bank, in the regular discharge of his duty, is sufficient evidence of the payment to interrupt prescription. *Union Bank v. Foster*, 14 La. An. 159. Indorsements of credits on a note, made by a promisee before the statute has closed upon the right to maintain suit, are evidence of corresponding payments, to remove the bar of the statute, in Pennsylvania, though no longer in England; but they are not evidence at all unless proved to have been made while the statute was running. To toll the statute by evidence of a payment, it must be proven unequivocally that the payment was made on the claim in suit; and where that is not done, the jury is not at liberty to find the payment sufficient. The indorsement of payment in the handwriting of the plaintiff or promisee alone is not proper to go to the jury. *Shaffer v. Shaffer*, 41 Penn. St. 51.

² *Briggs v. Wilson*, 17 Beav. 830; *Searle v. Barrington*, 8 Mod. 278; *Gleadow v. Atkin*, 1 C. & M. 421; *Sorrell v. Craig*, 15 Ala. 789; *Glynn v. Bank*, 2 Ves. 38; *Roseboom v. Billington*, 17 Johns. (N. Y.) 182; *Bailey v. Crane*, 21 Pick. (Mass.) 323; *Butcher v. Hixon*, 4 Leigh (Va.), 519; *Read v. Hurst*, 7 Wend. (N. Y.) 408;

an indorsement, in order to remove the statute bar, must be shown by affirmative evidence to have been made before the statute bar had attached to the debt, or that a payment was made upon the claim after the debt was barred which the indorsement covers; and the ordinary presumption that a writing was executed at the time it bears date does not attach.¹ Parol evidence is admissible to prove the fact of payment, or to defeat it, although evidenced by a writing;² but in order to be effective to remove the bar of the statute, it must be shown to have been a payment in reference to the demand in suit.³ Where a payment is made upon a note, and indorsed thereon by the holder, at the request of the payor, proof of such fact is sufficient to remove the statute bar.⁴ But unless a payment, as such, is actually made upon the note or claim in suit, or an indorsement is made with the debtor's assent, it cannot have the effect either to keep the debt on foot or revive it. Thus, where the debtor rendered services for the creditor, and the latter, without the debtor's assent, indorsed it upon a note he held against him, it was held not such a payment as would operate as a revival of the note.⁵ The usual medium of proof of a part payment of a note or other written obligation is by an indorsement thereon.⁶ But the *bona*

Clapp v. Ingersoll, 11 Me. 83; Wilcox v. Pearnon, 9 Leigh (Va.), 144; Brown v. Hutchings, 11 Ark. 83; Gibson v. Peoples, 2 McCord (S. C.), 418; M'Ghee v. Green, 7 Port. (Ala.) 537; Whitney v. Bigelow, 4 Pick. (Mass.) 110; McMasters v. Mather, 4 La. An. 419; Concklin v. Pearson, 1 Rich. (S. C.) 391; Connelly v. Pierson, 9 Ill. 108.

It has been held in California that, in the absence of any written acknowledgment or promise signed by the party to be charged, part payment does not take a debt, especially a specialty debt, out of the statute of that State. Thus a memorandum indorsed on an overdue bond acknowledged part payment, and changed the title and terms of payment, but was signed by the obligee alone, the obligor only assenting thereto. Suit was brought when the term of the statute had expired, since the payment fell due according to the terms of the original bond, but not since payment fell due under the agreement. Held, that the indorsement could be effective only as a verbal contract, and would not suffice to prevent the running of the statute against the original debt and bond. Peña v. Vance, 21 Cal. 142. In Michigan, it is held that unexplained indorsements of payments on a bond have no weight as

evidence of payment, for the purpose of charging the debtor, by treating them as an acknowledgment, so as to take the case out of the statute of limitations. Michigan Ins. Co. v. Brown, 11 Mich. 265. When an indorsement on a bond or note made by the obligee or promisee is relied on to take it out of the statute of limitations, the law determines whether such indorsement was or was not favorable to the party making it, at the time when it was made, and on this question depends its admissibility in evidence. Wilson v. Pope, 37 Barb. (N. Y.) 321.

¹ Shaffer v. Shaffer, *ante*; Guillon v. Perry (Penn.), 1 W. N. C. 39; Rowe v. Atwater, *id.* 149; Kinsloe v. Baugh, *id.* 147.

² Wolf v. Foster, 13 Kan. 116.

³ Read v. Hurst, 7 Wend. (N. Y.) 408; Howe v. Thompson, 11 Me. 152; Haven v. Hathaway, 20 *id.* 345; Addams v. Seitzinger, 1 W. & S. (Penn.) 243.

⁴ Hawley v. Griswold, 42 Barb. (N. Y.) 18; Sibley v. Phelps, 6 Cush. (Mass.) 172; Smith v. Sims, 9 Ga. 418.

⁵ Phillips v. Mahan, 52 Mo. 197; Kyger v. Ryley, 2 Neb. 20.

⁶ Alston v. State Bank, 9 Ark. 457; Chandler v. Lawrence, 3 Mich. 261; Connelly v. Pierson, 9 Ill. 108; Turner v.

fides of the indorsement must be proved when made by the creditor, and relied upon by him to remove the statute bar.¹ The rule in this respect was well stated by LORD ELLENBOROUGH in the case first cited in the last note. In that case, an action of debt on a bond dated in 1785 was brought, and there were several indorsements thereon, acknowledging the receipt of interest down to 1793, which were proved to be in the handwriting of the defendant. These were allowed to be good evidence of the bond remaining unsatisfied at the date of the last indorsement. The presumption from lapse of time being thus repelled, the plaintiff, for the purpose of meeting certain direct evidence of payment, in 1794, proposed to read other indorsements down to 1795, acknowledging the receipt of interest and part of the principal. But these latter indorsements were not in the handwriting of the defendant. An objection being taken to their being read, LORD ELLENBOROUGH thought it necessary to prove that they were on the bond at, or recently after, the times when they bore date. Although it may seem, he said, at first sight against the interest of the obligee to admit part payment, he may thereby, in many cases, set up the bond for the residue of the sum secured. If such indorsements, he continued, were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. And he had been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and he was of opinion that they could not properly be admitted, unless they were proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest. And it has ever since been held that it cannot be taken for granted, in all cases, because a person admits that any portion of an amount due him has been paid, that it in reality has been; and that the mere indorsement of a payment upon a promissory note by the holder, after the expiration of the time limited by the statute, affords no legal evidence that such payment was in fact made.

While the indorsement of a payment made after the note is barred does not furnish evidence sufficient to establish the fact of payment, yet the party seeking its benefit is not deprived thereof, if he can establish such fact by other competent evidence, as it is well settled that, except where the statute otherwise expressly provides, the fact of part payment may be established by parol, and that, too, even though it is evidenced by a writing, which is not produced.² But, as previously stated, an in-

Crisp, 2 Strange, 287; Sigourney v. Drury, 14 Pick. (Mass.) 387; Gale v. Capron, 1 Ad. & El. 102; Hathaway v. Haskell, 9 Pick. (Mass.) 42; Illsley v. Jewett, 2 Met. (Mass.) 168; Dowling v. Ford, 1 M. & W. 325; Howe v. Thompson, 11 Me. 152; Hunt v. Brigham, 2 Pick. (Mass.) 581.

¹ Rose v. Bryant, 2 Camp. 321; Briggs v. Wilson, 39 Eng. L. & Eq. 62; Beatty v. Clement, 12 La. An. 18; Beltzhoover v. Yewell, 11 G. & J. (Md.) 212; Vaughan v. Hankinson, 35 N. J. L. 79; Waters v. Tomkins, 2 C. M. & R. 723.

² Rose v. Bryant, 2 Camp. 321.

³ Wolf v. Foster, *ante*. In Eastwood v.

dorsement made a sufficient time before the statute has run to repel any idea that it was made solely with a view to prolong the life of the note, being against the interest of the payee, will keep the note on foot. Thus, in an action by an administrator on a promissory note commenced more than six years after the date of the note, an indorsement in the handwriting of the intestate of a payment purporting to have been made more than two years before the statute of limitations would attach, and six months prior to his death, it was held the jury might regard it as evidence of a new promise, though there was no proof other than as above of the time when said indorsement was actually made.¹ The effect of an indorsement may be repelled as proof that no payment was in fact made, or that it was made without the payee's assent. Thus, if the holder of a promissory note receives goods from the promisor, which at his request are sold, and the proceeds indorsed on the note within a reasonable time, it will be considered, in reference to the statute of limitations, as a payment by the maker's order. But if the holder makes such sale and indorsement after a reasonable time has elapsed, without the assent of or notice to the maker, this will not take the note out of the statute.² The fact that the rule in relation to indorsements made before the statute has run upon a note or other obligation is *prima facie* evidence of a payment, being predicated upon the circumstance that it is against the interest of the payee, it follows that the force of this presumption depends upon the time when it was made in reference to the

Saville, 9 M. & W. 615, in an action on a promissory note, made by the defendant, dated the 6th of June, 1834, whereby he promised to pay the plaintiff on demand £35, with lawful interest. There was also a count upon an account stated. Pleas, first, to the first count, that the defendant did not make the note; secondly, to the second count, non-assumpsit; thirdly, to the whole declaration, *actio non accrevit infra sex annos*. Issues thereon.

The particulars stated, that the plaintiff sought to recover £28, and interest from the 4th of August, 1837, being the balance due on the promissory note, after giving the defendant credit for the sum of £7 paid on account of the note, and also all interest due thereon up to the said 4th of August, 1837.

At the trial before ROLFE, B., on the note in question being produced in evidence by the plaintiff, it bore an indorsement as follows:—

“4th August, 1837.

“Received of John Saville, £6.

“BETTY × EASTWOOD.”

There was no attestation to this indorsement, nor any proof that the cross was made by the plaintiff; and the whole of it, except the cross, was proved to be in the handwriting of the defendant. There was no proof of any payment by the defendant on account of the note; but to take the case out of the Stat. 9 Geo. IV. c. 14, the plaintiff relied solely on the above indorsement. For the defendant, it was contended that it was an indorsement charging the plaintiff with the receipt of the money, and not an acknowledgment or promise to charge the defendant, within the meaning of Lord Tenterden's act; and that it was necessary to prove a payment of money in fact, to take the case out of the statute. But ROLFE, B., directed a verdict for the plaintiff, which was set aside in Exchequer upon the ground that the indorsement was not evidence of a part payment sufficient to take the case out of the statute, and in the absence of any proof of the fact of payment the plaintiff could not recover.

¹ Coffin v. Bucknam, 12 Me. 471.

² Porter v. Blood, 5 Pick. (Mass.) 54.

time when the statutory bar would attach. If an indorsement was made a year after the note was given, or even a year before the statutory bar attached, it would afford much stronger inherent evidence that a payment was in fact made upon the note, than one indorsed only a few days before the statute would run upon it. And an indorsement made after the statutory bar has become complete, being in the interest of the creditor, of course affords no evidence whatever of the fact of payment.¹ And, in order to make such indorsements even *prima facie* evidences of payment, under any circumstances, the plaintiff ought to be required to show that they were made at the time they bear date.² An indorsement by the plaintiff, without the knowledge of the defendant, does not operate to take the note out of the statute, unless it is accompanied by proof that the payment was in fact made to apply on the note.³ In Mississippi it is held that a part payment is not sufficient to take the debt out of the operation of the statute, unless it is accompanied by an express admission made at the time, not only that the debt is due and unpaid, but that the payment is of only part of the debt;⁴ and from the mere fact of part payment the jury are not warranted in finding a promise to pay the balance.⁵ Where a demand is payable by instalments, and all are due, a general payment will take the entire demand out of the statute.⁶ If an account is presented to a debtor, and he examines and makes no objection to any items of it, a general payment on account, without specifying any particular application, saves the whole account from the statute.⁷

SEC. 116. Evidence of Part Payment. — The burden of establishing the fact of a part payment, and all the elements requisite to give it effect as such in the removal of the statute bar, is upon the plaintiff;⁸ and, in those States where an acknowledgment or new promise must be in writing, cannot be proved by an indorsement upon the note or other obligation made by the payee.⁹ But an indorsement of a part pay-

¹ See *Rose v. Bryant*, *ante*.

² *Ibid.*; *Clapp v. Ingersoll*, 11 Me. 83; *Watson v. Dale*, 1 Port. (Ala.) 247. The *bona fides* of the indorsement must be shown. *Chambers v. Walker*, 4 Rich. (S. C.) 548.

³ *Whitney v. Bigelow*, 4 Pick. (Mass.) 110.

⁴ *Foote v. Bacon*, 24 Miss. 156; *Anderson v. Robertson*, *id.* 389; *McCullough v. Henderson*, *id.* 92; *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663; *Davidson v. Harrison*, 33 Miss. 41.

⁵ *Smith v. Westmoreland*, *ante*.

⁶ *Nesom v. D'Armand*, 13 La. An. 294.

⁷ *Peck v. New York Steamship Co.*, 5 Bosw. (N. Y.) 226; *Dyer v. Walker*, 54 Me. 18.

⁸ *Biggs v. Roberts*, 85 N. C. 451.

⁹ *McMasters v. Mather*, 4 La. An. 419; *Connelly v. Pierson*, 9 Ill. 108; *Taylor v. McDonald*, 2 Mill (S. C.) Const. 178; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Conklin v. Pearson*, 1 Rich. (S. C.) 391. In *Knight v. Clements*, 45 Ala. 89, 6 Am. Rep. 693, this question was raised, and the facts and the rules adopted are well stated by PARK, C. J. He said: "In an action on a promissory note made by three parties against one of the makers, who pleads the statute of limitations, and the plaintiff seeks to avoid the bar of the statute by a payment indorsed on the note before the bar was complete, he must prove affirmatively — the burden is on him — that the payment was made by the defendant before the cause of action was barred."

ment upon a note or other obligation made by the debtor himself is

“The statute requires this. It declares that ‘no act, promise, or acknowledgment is sufficient to remove the bar to a suit, or is evidence of a new and continuing contract, except the partial payment made upon the contract by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby.’ Rev. Code, § 2914. In this case the plaintiff, to avoid the bar of the statute of limitations, relied on two alleged payments indorsed on the note sued on, before the bar of the statute was complete. The suit was commenced in the name of Eliza Perry, who in the complaint is averred to be the owner of the note. The note is payable to one Zebulon Rudolph, Sen., or bearer. On her death, during the progress of the cause, the appellees, her executors, were made parties plaintiff.

“The note was made by one Alexander Reid, Jesse B. Knight (plaintiff’s intestate), and one C. W. Knight, and all three were made defendants. The summons not being served on said Reid, the complaint was amended by striking out his name. Thereupon the death of Jesse B. Knight was suggested, and appellant, his administrator, was, at a subsequent term, made a defendant in his stead. It seems, in the meanwhile, and before the death of Eliza Perry, the original plaintiff, a trial was had between her and defendant, C. W. Knight, on pleas of the statute of limitations, filed by defendants before the death of said Jesse B. Knight, and there was a verdict and judgment for said C. W. Knight.

“Afterward, the cause was tried between the appellees, as the executors of the said Eliza Perry, and appellant, the administrator of said Jesse B. Knight, on the original pleas of the statute of limitations. These pleas were filed by each defendant separately, each for himself. The note, on its face, being barred by the statute, the complaint averred that two payments had been made on it after maturity, and before the bar of the statute was complete. On that trial, one of the plaintiffs was introduced as a witness, and it was offered to be proved by him that the indorsements

of the payments on the notes were in the handwriting of one R. B. Rudolph; that said Rudolph was the general agent of said Eliza Perry, and transacted all her business, but was then dead. The appellant objected to the competency of said witness to prove that said indorsements were in the handwriting of said Rudolph, and that he was the agent of Eliza Perry. The court overruled the objection, and appellant excepted. The witness was then examined, and stated that said indorsements were in the handwriting of said R. B. Rudolph; that he was the agent of said Eliza Perry, and was dead. On this evidence, the plaintiffs offered to read said indorsements to the jury. To this the appellant objected, his objection was overruled, and he excepted. Thereupon the court permitted the said indorsements to be read to the jury as evidence of said payments at the times stated in said indorsements. To this appellant objected, his objection was overruled, and he excepted. The plaintiffs then rested. The appellant then introduced a witness, who testified that said note was made by said Reid as principal, and the other two joint makers as his sureties. The appellant was then examined as a witness, and testified that said note was written by him and signed by said Reid, Jesse B. Knight and himself; that said Jesse B. Knight signed the note at the request of said Reid, saying, at the time, he would sign for but few men; that said note was made at the house of said Jesse B. Knight; that said Reid took the note, and he and witness went together to the house of the payee, said Zebulon Rudolph, Sen., and passed the note to him, and he gave the money for it to said Reid; that it was a loan of money on said note.

“This was all the evidence in the case. On this evidence the court gave two charges to the jury. The second was excepted to by the appellant, and is as follows, to wit: ‘If the jury believe from the evidence that there was a payment made on the note sued on, on the twenty-sixth day of January, 1859, and that there is no evidence to show by which particular obligor the payment was made, you may, as a matter of law, presume it was made

sufficient evidence of a new promise to remove the statute bar, unless

by the parties jointly chargeable with the payment.' To this charge the appellant excepted.

"The appellant then asked the court to give the following charge, to wit: 'If the jury believe from the evidence that Jesse B. Knight and C. W. Knight were merely sureties for Alexander Reid on the note sued on, then the jury would not be authorized to presume, as a matter of law, that the payments indorsed on the note were made by Jesse B. Knight and C. W. Knight, or by either of them, without further proof.' This charge the court refused, and appellant excepted. The appellant then asked the court to give the following written charge, to wit: 'That the indorsed credits on the notes are no evidence against Jesse B. Knight, or his administrator, that any payment was made, or the time of such payment; and that unless the evidence showed that Jesse B. Knight, in his lifetime, made the payments indorsed on the note, then the jury must find for the defendant, the only issue being on such payments.' The court refused to give this charge as asked, and the defendant excepted. The court thereupon gave the said charge, but with the qualification that the charge No. 2 must be taken as a qualification thereof. And the appellant excepted to the charge thus given, with the qualification.

"1. The indorsements on the note, on the evidence of the plaintiffs, were utterly worthless to prove either that the alleged payments were made, or by whom made, or when made; and without this, they should not have been permitted to be read to the jury. If they had been proved to be in the handwriting of the appellees' testator, said Eliza Perry, without more evidence, to permit them to be read to the jury to defeat the bar of the statute, would have been to permit her to make evidence for herself. In the case of *McGehee v. Greer*, 7 Port. 537, the court say: 'A payment on a note is, we think, precisely equivalent to an admission that, at the time of the payment the debt is due; but it is necessary that the party relying upon such payment should prove the date of the payment. To permit that fact to be estab-

lished by the credit entered on the note would be, manifestly, allowing the party relying on it to make evidence for himself.'

"Where a party relies on an indorsed payment on a note to stop the operation of the statute of limitations, 'such payment must be proved to have been made at the time it bears date.' *Watson v. Dale*, 1 Port. (Ala.) 247. So, too, an admission made by a principal maker of a note, coupled with a promise to pay, will not revive the debt so as to take it out of the bar of the statute of limitations, as against a co-maker, who is a surety; nor will payments made by him have the effect to prevent the running of the statute. *Lowther et al. v. Chappell*, 7 Ala. 353; and in *Myatts & Moore v. Bell*, 41 id. 222, it is held that 'a payment by one of several joint debtors, before the statute has completed a bar, will not prevent the completion of the bar as to the others, at the expiration of the time within which the statute required suit to be brought on the original evidence of debt relied on to sustain the action.' The court below, therefore, clearly erred in permitting these indorsements of credits on the note to be read to the jury as evidence of payments made at the times stated in said indorsements, without further proof of the fact of the payments, and by whom, and when made.

"2. The second charge of the court, on the evidence in this case, to say the least of it, was inappropriate and inapplicable, if not abstract, and was well calculated to mislead the jury, and should not have been given.

"3. The first charge asked by appellant was a very proper charge, was warranted by the evidence, and should have been given. The evidence by no means authorized the jury to presume, as a matter of law, that the payments were made by Jesse B. Knight or C. W. Knight, or either of them, especially if they believed from the evidence they were the mere sureties of said Reid. In that case, the presumption was directly the other way.

"4. The second charge in writing should have been given or refused in the terms in which it was written (Rev. Code, § 2756); and in refusing to give it in the

the statute requires that a new promise, &c., shall be signed by the debtor;¹ and it has been held that an indorsement of a payment made by an officer of a bank upon a note or bond due to the bank, in the regular course of his duties, is sufficient evidence of the payment;² and in Massachusetts it has been held that an indorsement made by the holder of the note, with the express assent of the maker, is sufficient.³ But while, where the statute does not require an acknowledgment or new promise to be in writing, and signed by the debtor, an indorsement made by the holder of a note of a payment is *prima facie* evidence of the fact,⁴ yet, where the statute imposes this condition, such an indorsement of itself affords no evidence whatever of the fact of payment.⁵ But the plaintiff is not deprived of the benefit of the payment to repel the statute, if he can prove the fact by other and conclusive evidence. The only consequence of a failure to have the debtor himself make the indorsement is to deprive the plaintiff of a ready and satisfactory means of proof, and to leave him to establish the payment by other proof, if he can. An indorsement under the old rule predicated upon the former statutes never afforded more than *prima facie* evidence of the fact of payment, and might be disproved.

terms in which it was written, and giving it with the qualification stated against the objection of the appellant, the court erred. *Edgar v. The State*, 48 Ala. 312."

¹ *Tappan v. Kimball*, 30 N. H. 136; *Sage v. Ensign*, 2 Allen (Mass.), 245.

² *Union Bank v. Foster*, 14 La. An. 159.

³ *Sibley v. Phelps*, 6 Cush. (Mass.) 172.

⁴ *Addams v. Seitzinger*, 1 W. & S.

(Penn.) 243; *Howe v. Saunders*, 38 Me. 350. In *Maskell v. Pooley*, 12 La. An. 661, it was held, however, that, in order to make such a payment effectual, it must be shown where and by whom the payment was made. See also *Gordon v. Schmidt*, 20 id. 427.

⁵ *Connelly v. Pierson*, *ante*; *McMasters v. Mather*, *ante*.

CHAPTER X.

WHEN STATUTE BEGINS TO RUN. CONTRACTS.

SEC. 117. Must be Party to sue or be sued.

118. When Demand is necessary to start the Operation of the Statute.

119. General Rules as to when there is a Condition Precedent.

SEC. 120. Contracts for Services.

121. Rule as to Services of Attorneys.

122. When Attorney is charged with Misfeasance or Malfeasance.

SEC. 117. **Must be Party to sue or be sued.** — By the express terms of all the statutes, the statute of limitations only begins to run from the time when the right of action accrues; ¹ but an important rule

¹ *Sims v. Gay*, 109 Ind. 501; *Ewell v. Chicago, &c. R. R. Co.*, 29 Fed. Rep. 57; *Sohn v. Waterson*, 17 Wall. (U. S.) 596; *Dyer v. Witter*, 89 Mo. 81; *Wright v. Tichenor*, 104 Ind. 185; *Wright v. Kleyla*, 104 Ind. 223; *Kulps App.* 115 Penn. St. 356; *Cutler v. Motzer*, 13 S. & R. (Penn.) 356; *Walker v. Hill*, 111 Ind. 223. If either of the parties is under a disability, or under two disabilities, or if a disability supervenes an existing one, the statute does not begin to run until the last disability is removed. *Campbell v. Crater*, 95 N. C. 156. The statute does not begin to run against an estate in dower until it has been assigned, *Holmes v. Kring*, 98 Mo. 452; *Johns v. Fenton*, 88 Mo. 64, or until she has conveyed it; *Smith v. Shaw*, 150 Mass. 297, nor against devisees and legatees until a substantial right of action accrues. *Garesche v. Lewis*, 93 Mo. 197. Nor in the case of lands until there is an actual adverse possession. It does not begin to run against a remainderman until the determination of the prior estate. *Fleming v. Burham*, 100 N. Y. 1. Where there is a tenancy by curtesy a right of action does not accrue to their heir until the tenant's death, *Smith v. Paterson*, because until the happening of that event no right of entry on the part of the heir exists. *Wright v. Tichenor*, *ante*; *Orthwein v. Thomas*, 127 Ill. 554; *Walsh v. Chicago, &c. R. R. Co.*, 19 Mo. App. 127. In the

case of mutual accounts it runs from the date of the last charge or entry. *Albany v. Hill*, 64 Miss. 540. In those States where the statute does not begin to run where the cause of action is fraudulently concealed, the statute does not begin to run against a claim for a return of a part of the purchase-money for land, where it was bought by the acre and more was paid for than was in fact conveyed until the discovery of the mistake. *Biggs v. Lexington, &c. R. R. Co.*, 79 Ky. 470. Where a deed is sought to be impeached because it was made in fraud of his creditors, the statute begins to run from the time the fraudulent deed was recorded, or from the time the creditor had actual notice of the conveyance, whichever occurred first. *Hughes v. Litrell*, 75 Mo. 573. Where a person who is occupying premises as a tenant, whether rent free or otherwise, buys it in at a tax sale, without the owner's knowledge, the statute only begins to run from the time of the discovery of the fraud. *Duffett v. Tuhan*, 28 Kan. 292. If property sold where nothing is said as to time when it is to be paid for, it is presumed that it is to be paid for on delivery, and the statute begins to run from the time of delivery. *Rous v. Walden*, 82 Ind. 238. For a deposit of money with a bank or banker the statute begins to run from the time when it was taken. *Brown v. Pike*, 34 La. An. 576; *British N. Am. Bank v. Merchants' Bank*, 101

to be borne in mind determining when the statute attaches to a claim is, that at the time when a right of action accrues there must be in existence a party to sue and be sued, or the statute does not attach thereto.¹ Consequently it follows that if at the time a right of

N. Y. 96; *In re Waldron*, 28 Hun, 421. In actions against estates the statute begins to run from the appointment of the executor or administrator. *Underhill v. Mobile Ex. Ins. Co.*, 67 Ala. 45. Where a person agrees to pay for services or any other claim by provision in his will in favor of the creditor, the statute only begins to run from the time of the person's death, because until that time there is no breach of the contract and no right of action. *Eagan v. Kergill*, 1 Demorest (N.Y.), 464. Against an indorser of a note payable on demand the statute begins to run immediately, without demand. *McMullen v. Rafferty*, 89 N. Y. 456. Where a statute gives a town or city or other municipal corporation the rights to take the waters of a river, and provides that no personal damage may be applied for, the assessment of his damages at any time within three years from the taking of his property, or the construction of said works, and that no application shall be made until the water is actually diverted by the town, the statute begins to run from the time when water is first withdrawn therefrom by the direction of the engineer, although it is merely for the purpose of testing the engine. *Tenneston v. Brookline*, 134 Mass. 438; *Goff v. Pawtucket*, 13 R. I. 471. Where a person agrees to pay a debt when able, the statute does not begin to run until the promisor's ability to pay first existed. *Tebou v. Robinson* 29 Hun (N. Y.), 243. The statute begins to run in favor of the sureties of an executor's bonds from the time of the judicial ascertainment of the principal's liability; *Bonner v. Young*, 68 Ala. 35; and in favor of sureties on the bond of a guardian from the settlement of his account as guardian. *Adams v. Jones*, 68 Ala. 117. Upon a due bill payable on demand, the statute begins to run from its date, not from the time of demand. *Andress's Appeal*, 99 Penn. St. 421. The statute begins to run upon a note payable upon demand from the day of the delivery of the note, and not necessarily from the

date of the note, because until delivery it does not become operative or give the payee a right of action. *Collins v. Driscoll*, 69 Cal. 550. The statute begins to run in favor of a principal against an agent for negligence in the performance of his duties from the time the principal becomes aware of the fact upon which his right of action depends. *King v. MacKellar*, 109 N. Y. 215. But this rule only applies in those States where the statute is suspended by concealment of the fraud, or where it is held that a demand must first be made. Actions for breach of covenants of warranty do not accrue until the covenantee has made payments to protect his rights. *Taylor v. Priest*, 21 Mo. App. 685; *Priest v. Daver*, 21 id. 209.

¹ *Murray v. East India Co.*, 5 B. & Ald. 204; *Daniel v. Day*, 51 Ala. 481; *Granger v. Granger*, 6 Ohio, 35; *Meeks v. Vaas*, 31 Ark. 364; *Clark v. Hardiman*, 2 Leigh (Va.), 347; *Bucklin v. Ford*, 5 Barb. (N. Y.) 393; *Johnson v. Wren*, 3 Stew. (Ala.) 172; *Wood v. Ford*, 29 Miss. 57; *Sewall v. Valentine*, 6 Pick. (Mass.) 276; *Sherman v. Western, &c. Co.*, 24 Iowa, 515; *Fulensnieder v. United States*, 9 Ct. of Claims (U. S.), 403; *Lewis v. Broadwell*, 3 McLean (U. S. C. C.), 568. In *Grubb v. Clayton*, 2 Hayw. (U. S. C. C.) 378, it was held that the statute cannot operate as a bar against a deceased person's estate if there is no administrator to sue, although letters of administration have been taken out in a foreign country. In *Bucklin v. Ford*, 5 Barb. (N. Y.) 393, it was held that where one received property belonging to the estate of a deceased person, before administration was granted thereon, the statute began to run against the right to secure the same from the time when administration was granted, and not from the time when the property was received. *Davis v. Gurr*, 6 N. Y. 124; *Thurman v. Shelton*, 10 Yerg. (Tenn.) 383. When the statute begins to run nothing stops its operation, except the statute so provides; but the statute does not begin to run until there

action accrues either the person entitled to enforce it, or against whom it exists, is dead, and no executor or administrator of his estate has been appointed, the statute does not attach to the claim or begin to run thereon until such appointment is made and the person appointed has qualified; but as soon as a legal representative is appointed, the statute attaches to the claim and begins to run thereon.¹ And the fact that an executor or administrator has been appointed in another State has no effect; the statute does not begin to run until there is a legal representative of the deceased in the State where the remedy is sought. Thus, in the case last cited the plaintiff's testatrix died in New York in 1822, owning stock in a turnpike company in Connecticut. Her will was approved and her executors were qualified in the State of New York soon after her decease. In 1841 administration was granted in Connecticut, and an administrator *cum testamento annexo* was appointed, and he brought an action against the turnpike company to recover dividends declared by it between April, 1826, and April, 1834. To this action the defendants set up the statute of limitations; but the court held that the statute did not begin to run against a claim in favor of a deceased person's estate, only from the time of the proving of the will or the granting of administration in that State; HINMAN, J., saying, "Independently of authority, we think it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."² For the rule when the statute has begun to run before a person's death, see chapter on EXECUTORS AND ADMINISTRATORS.

SEC. 118. When Demand is necessary to start the Operation of the Statute. — In all cases where a demand is necessary to fix the liability of a party, except where, as is the case in several of the States, provision is made in the statute that when a demand is necessary before an action can be brought it shall be deemed to have been made at the time when the right to make the demand accrued,³ the statute of limitations is not put in motion until such demand is made,⁴ although

is one in being competent to sue or be sued. *Ruff v. Bull*, 7 H. & J. (Md.) 14; *Crassier v. Gano*, 1 Bibb (Ky.), 257; *Faysoux v. Prather*, 1 N. & M. (S. C.) 298; *Rogers v. Hillhouse*, 3 Conn. 398; *Peck v. Randall*, 1 Johns. (N. Y.) 165; *Johnson v. Wren*, 3 Stew. (Ala.) 172; *Ewell v. Chicago, &c. R. R. Co.*, 29 Fed. Rep. 57; *Glass v. Williams*, 16 Lea (Tenn.), 607.

¹ *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145; *Lee v. Gause*, 2 Ired. (N. C.) L. 440.

² See also *Grubb v. Clayton*, *ante*. Provision is made in the statutes of many of the States for a suspension of the statute upon the death of a creditor or debtor.

³ Such a provision exists in the statutes

of Tennessee, § 2780; New York, § 410; and Alabama, § 3241.

⁴ *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Wolfe v. Whiteman*, 4 Harr. (Del.) 246. Upon a promise to deliver goods on demand, an action will not lie until a demand is made therefor; consequently the statute begins to run from the date of the demand, and not from the date of the contract, and a plea *non assumpsit infra sex annos* is not a proper plea, but *actio non accrevit infra sex annos*. *Brewster v. Hobart*, 15 Pick. (Mass.) 302. Where a demand is requisite before a specific performance can be sought, the statute begins to run from the date of the demand, and a new cause of action cannot be created by a new demand.

if a demand is not made in a reasonable time a court of equity will treat the claim as stale, and refuse to aid in its enforcement;¹ and

Bruce v. Tillson, 25 N. Y. 194; *Taylor v. Rowland*, 26 Tex. 293. A certificate of deposit issued by a banker, payable "on demand," is due from its date, and no special demand is necessary. *Brummagin v. Tallant*, 29 Cal. 503.

In *Shutts v. Fingar*, 100 N. Y. 539, it was held that no cause of action arises against an indorser of a promissory note payable upon demand, with interest, until after actual demand, and until such demand the statute of limitations does not begin to run as against the indorser. In order to hold the indorser, however, it must appear that a demand was made of the maker, or if more than one, and the note is not a partnership one, of each of the makers, upon a subsisting obligation; so that the holder upon payment by the indorser may deliver to him the note unimpaired by any act or omission on his part subsequent to the contract of indorsement. Where, therefore, the holder omits to make demand until the liability of the maker, or one of several makers, has been discharged by the running of the statute, the indorser is thereby discharged.

Trimble v. Thorne, 16 Johns. (N. Y.) 152; *Wells v. Mann*, 45 N. Y. 327, distinguished.

¹ In *Codman v. Rogers*, *ante*, the executor of one of two copartners, having made a partial settlement with the surviving partner, lay by for seventeen years, and until after the death of the surviving partner, without making a demand for a further accounting, and in the mean time many of the partnership papers had been destroyed by two successive fires, and no cause for the delay was shown, the court refused to sustain a bill for an account. *WILDE, J.*, in delivering the judgment of the court, said: "Generally, where a debt is payable in money and on demand, the statute of limitations begins to run immediately after the debt is contracted; but if a demand previous to the commencement of the action is necessary, the statute will not begin until the demand is made. But in the latter case there must be some limitation to the right of making a demand. A party must not be permitted

to sleep over his rights, to the prejudice of the party on whom he makes a claim, and who by the delay may be deprived of the evidence and means of effectually defending himself. A demand must be made in a reasonable time, otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is considered a reasonable time does not seem to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action, and in both cases the same presumptions arise from delay." See also *McDonnell v. Branch Bank*, 20 Ala. 312, where the same rule was applied in an action against a clerk of the court for money collected on a judgment. In that case, while it was held that an action could not be maintained without proof of a demand, or actual conversion, yet it was held that the demand must be made within a reasonable time after the collection to avoid the statute. In a later case in the same State, *Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24, it appeared that a special deposit of coin was made with one William O. Winston, deceased, for which receipts were given as follows: "Deposited with me for safe-keeping by William H. Wright, eight hundred and five dollars (\$805), in gold, which I am to return whenever called for, this 4th day of November, 1857. Wm. O. Winston." Upon this receipt was an indorsement: "Presented for settlement April 20, 1872. J. N. Winston, Admr. of Estate of Wm. O. Winston." There was also another receipt as follows: "Received January 25, 1858, of Wm. H. Wright, forty dollars in gold, on deposit, to be paid by him on demand (\$40). Wm. O. Winston." The first receipt was held to amount to a special deposit payable only on demand, but the second was held to amount only to a contract for the loan of money, and that the statute began to run thereon from its date. As to the first re-

courts of law will presume that such demand was made from the lapse of time, especially where the situation and relation of the parties are such as to render it improbable that it should be neglected.¹ But where delay in making the demand is expressly contemplated, even though the obligation is in terms payable on demand, there is no rule of law that requires that demand should be made within the statutory period for bringing an action.² Thus, in the Missouri case last referred to, an obligation for the payment of money one day after date contained a condition that if the payee should demand payment during her natural life it should be due and payable, but in case of her death before any or all of the debt should be paid it should not be paid at all, it was held that a demand made more than ten years after the obligation was executed was in season, and that an action brought immediately thereafter was not barred by the statute.³ Where a promissory note made payable "three months after demand" was sought to be enforced more than twenty years after its date, and the statute of limitations was interposed as a bar thereto, it was held that, as no demand had been made until within six years from the bringing of the action, the statute had not run thereon, and that the fact that there were two indorsements of interest upon the note, made more than twenty years before the action was brought, was not sufficient to warrant the court in presuming that the note had been satisfied, in the absence of proof that a demand had been made.⁴ Where, however, a note or other

ceipt, although no demand was made therefor, yet seventeen years having elapsed since the deposit was made, and the depository having died in the mean time before demand was made or suit brought, it was held that the delay was unreasonable, and conclusive against a recovery. And, generally, it may be said that equity will refuse to interpose to give relief upon a stale demand, although technically the statute of limitations has not run upon it, unless the laches are properly explained, and the explanation is sufficient to excuse the delay. *Phillips v. Rogers*, 12 Met. (Mass.) 405.

¹ *Staniford v. Tuttle*, 4 Vt. 82; *Callard v. Tuttle*, id. 491; *Raymond v. Stevenson*, 4 Blackf. (Ind.) 77. See *post*, section Laches and Stale Demands.

² *Jameson v. Jameson*, 72 Mo. 84. The period within which the statute will bar the claim is held to be a reasonable time to make demand. Thus, a note payable on demand is barred in six years; consequently, a demand made within six years, where a demand is necessary, is made

within a reasonable time, and the statute begins to run from the time when demand was made. *Thrall v. Mead*, 40 Vt. 540.

³ *La Farge v. Jayne*, 9 Penn. St. 410. In *Stanton v. Stanton*, 37 Vt. 411, a note was made payable "in produce or wood from the farm on demand as the payee may want to use the same." A demand for the payment of the note was delayed for twelve years, and the court held that the statute did not run upon the note in the absence of proof, when, as a matter of fact, a reasonable time for making the demand expired, or of facts from which the law would assume a limit to such reasonable time.

⁴ *Brown v. Rutherford*, 42 L. T. Rep. n. s. 659. In *Thorpe v. Booth*, Ry. & Moo. 388, a note as follows was executed: "March 12, 1813. Twenty-four months after demand, I promise to pay my sister Frances Booth the sum of seven hundred pounds. Joseph Booth." The note was presented for payment on the 28th of June, 1828, and in a suit thereon

obligation, involving only the payment of money, is made payable "at sight" or "on demand," as an action thereon can be commenced at once, and the service of the writ is a sufficient demand, it becomes due instant, and the statute begins to run thereon from the date of the note;¹ and the fact that it is payable with interest does not change the rule or warrant the presumption that a delay in making the demand was contemplated.² A note or bill payable at sight is payable immediately,

the defendant set up the statute as a bar, but it was held that the statute had not run. See also *Harrison v. Kerrison*, 2 Taunt. 323; *Mills v. Davis*, 113 N. Y. 243.

¹ *Cook v. Cook*, 19 Tex. 484; *Hall v. Letts*, 21 Iowa, 596; *Darnall v. Magruder*, 1 H. & G. (Md.) 439; *Easton v. McAllister*, 1 Mo. 662; *Wilks v. Robinson*, 3 Rich. (S. C.) 182; *Lanason v. Lambert*, 13 N. J. L. 247; *Hill v. Henry*, 17 Ohio, 9; *Newman v. Kettell*, 13 Pick. (Mass.) 418; *Hirst v. Brooks*, 50 Barb. (N. Y.) 334; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Caldwell v. Rodman*, 5 Jones (N. C.) L. 139; *Taylor v. Witman*, 3 Grant's Cas. (Penn.) 138; *Fell's Point Savings Institution v. Weedon*, 18 Md. 320; *White's Bank v. Ward*, 35 Barb. (N. Y.) 637; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Norton v. Ellam*, 2 M. & W. 467; *Peaslee v. Breed*, 10 N. H. 489. If the note has no date, then the statute runs from its delivery. *Smyth v. Bythewood*, 1 Rice (S. C.), 245. See *Byles on Bills*, 342. Where, as in some of the States, the statute fixes a time within which such notes will be treated as maturing, in order to charge an indorser, the time named therein for presentment and notice or protest would probably be treated as the time when the right of action thereon matures and the statute begins to run upon the note, unless, as may be done, a demand is actually made before; in which case the statute would begin to run from the time demand was actually made.

² *Norton v. Ellam*, *ante*; *Wheeler v. Warner*, 47 N. Y. 519; *Hirst v. Brooks*, 50 Barb. (N. Y.) 334. But upon a certificate of deposit payable on demand and bearing interest the statute does not begin to run until a demand is made. *Payne v. Gardiner*, 29 N. Y. 146. But in *Meador v. Dollar Savings Bank*, 56 Ga. 605, a

bank certificate of deposit payable to the order of the depositor, but indicating no time of payment other than can be inferred from the words, "interest at the rate of seven per cent on call," was held to be payable on demand. In *Tripp v. Curtinius*, 36 Mich. 494, such a certificate payable to order, on return of the certificate is payable on demand. A note payable on demand is due presently, even though it contains a clause providing that it shall not draw interest "during the life of" the promisor, and from those words the court will not infer that it was only to become payable after his death. *Newman v. Kettle*, 13 Pick. (Mass.) 418. In *Holland v. Clark*, 32 Ark. 697, this distinction is noticed between the time when the statute begins to run against a note entitled to grace, where a demand is made, and where no demand is made. In the former case, if a demand is made on the last day of grace, the statute is held to begin to run from that day; but if no demand is made, it does not begin to run until the succeeding day: that is, upon a note entitled to grace which falls due April 1st, if demand is made April 4th, the statute would begin to run April 4th; but if no demand is made, the statute would not begin to run until April 5th, and a suit brought within the statutory period, dating from that time, would be in season. Where vouchers given by a public officer fix a certain time for payment, the statute does not begin to run except from that time. *Bulkley v. United States*, 9 Ct. of Claims (U. S.), 517. Where a note is given without interest, but a separate instrument is at the same time executed agreeing to pay interest thereon, the two instruments are treated as one, and the statute attaches to both at the same time. *Prevo v. Lathrop*, 2 Ill. 305. In such a case, if the interest is usurious and the notes representing the interest are first paid, the payment will be

and neither presentment nor demand is a condition precedent to payment, consequently the statute attaches thereto from the day of its date.¹ Where money is loaned "to be paid when called for," it is treated as payable on demand, and the statute begins to run from the date of the loan;² and the same is true as to money loaned to be paid "when called on to do so."³ A note drawn payable "one day after" a certain event happens, is not due until the day after the occurrence of the event. The maker has all of that day in which to pay the money, and an action commenced during the day would be premature. Consequently an action upon it is not barred until the lapse of the time allowed after that day, and not including it.⁴ Where, however, a note or bill is payable after sight, no debt accrues thereon until presentment. Therefore the statute is no bar to an action on such a note, unless it has been presented for payment six years before the action, the expressions "after date" and "after sight" not being synonymous.⁵

A bill or note payable after demand or after notice is not payable till demand made or notice given.⁶ Thus, in an English case⁷ the statute was held not to be a bar to an action on a promissory note payable twenty-four months after demand, which had been made long previously but was presented for payment within six years before the action was commenced, but not until ten years after the note was given. In a late Michigan case,⁸ the doctrine, as previously stated in reference to

treated as having been made on account of the principal debt, for which the borrower is legally liable, and the right to recover back money paid as usury will not arise until the whole debt is paid. *Booker v. Gregory*, 7 B. Mon. (Ky.) 439.

¹ Byles on Bills, 342, 11th Eng. ed.

² *Ware v. Hervey*, 57 Me. 391.

³ *Darnall v. Magruder*, 1 H. & G. (Md.) 439.

⁴ *Hathaway v. Patterson*, 45 Cal. 294.

⁵ *Holmes v. Kerrison*, 2 Taunt. 323; *Sturdy v. Henderson*, 4 B. & Ald. 592; *Sutton v. Toomer*, 7 B. & C. 416.

⁶ *Thorpe v. Booth*, Ry. & M. 388; *Clayton v. Gosling*, 5 B. & C. 360.

⁷ *Brown v. Rutherford*, *ante*.

⁸ *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605. CAMPBELL, J., said: "It is now well settled that a note payable on demand is payable at once and without demand, so that the statute runs from its delivery. And this rule has been applied where, from the form of the contract, it is manifest that immediate payment was not expected. Thus, in *Norton v. Ellam*, 2

M. & W. 461, the note called for interest, which indicated at least an expectation of some delay. In *Howland v. Edmonds*, 24 N. Y. 307, the premium capital notes of a mutual insurance company, payable 'in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require,' were held to stand on the same footing with ordinary demand notes, so that the statute began to run from date. In *Waters v. Thanet*, 2 Q. B. 757, a party had promised to pay the amount of certain dishonored bills 'whenever my circumstances may enable me to do so, and I may be called upon for that purpose.' This promise was made in 1803. An action was begun in 1838, less than six years after demand, and within a year after the plaintiff had learned of defendant's having become solvent through inheritances. It appeared, however, that he had actually become able to pay in 1825, and the court held the statute ran from such ability without demand. A similar decision was made in *Jones v. Eisler*, 3 Kan. 134,

a note payable one day, &c., after demand, was repudiated, and a note payable "thirty days after demand" was held to become due and pay-

where the note was payable when the maker received a payment from government, or as soon as otherwise convenient. The statute was held to run after a reasonable time, which there was held on the facts to have been not later than sixty days. In *Emery v. Day*, 1 C. M. & R. 245, a contract was made for work payable out of a public fund to be provided, but it was held the statute began to run from the time the work was completed, although the fund was not raised until some time thereafter. If this question depends upon any reasonable principle, it is impossible to find any ground for holding notes payable on demand as setting the statute running at once, which would not make the note in the present case barred in six years after the expiration of thirty days. The payee could have presented it at any time, and it is not the design of the statute to put it in the power of the creditor to postpone its application at his own pleasure.

"Such notes are very rarely given. It is quite common to make bills of exchange payable at or after sight. But the drawer and indorsers are discharged by any considerable delay. It is one of the legal conditions of such paper that there shall be a speedy presentment. Why a different rule should be applied to a note is not evident. There are not more than half a dozen cases, if so many, in which this form of note has been passed upon directly. In *Holmes v. Kerrison*, 2 Taunt. 823, it was held that a note payable after sight was not barred until six years after it had been presented for payment. And in *Thorpe v. Booth*, Ry. & M. 388, upon the authority of that decision, a note dated March 12, 1813, payable twenty-four months after demand, and not demanded until June 28, 1823, was held not barred. In *Holmes v. Kerrison*, the case is put without further reasoning, upon the ground that no action could have been brought until after presentment, and *Thorpe v. Booth* contains no reasoning at all. While these decisions seem to have settled the practice in England, no subsequent case, so far as we have been informed, seems to

have affirmed or vindicated them in any direct way, although they are probably adhered to. But so far as their principle is involved, it has been departed from to some extent at least. In *Webster v. Kirk*, 17 Q. B. 944, it was held that a payee who had been sued by a subsequent holder of a dishonored bill could not in turn sue the drawer more than six years after the dishonor of the paper, although a much less time had elapsed since his own liability had been enforced. It was urged that the payee could not sue on a note which he did not hold, and that no action therefor accrued to him until he was damnified. But the Court of Queen's Bench held, nevertheless, that the statute ran from the dishonor. This could only have been upon the ground that any of the parties might have taken up the paper and thus obtained a right of action. In *Clayton v. Gosling*, 5 B. & C. 360, a note payable twelve months after notice had not been presented before the maker went into bankruptcy. The question came up whether it was provable under the commission as an existing debt due, and it was held provable. The court, however, placed the decision upon the ground that, inasmuch as the note contained the words "for value received," it was an admission of an existing debt, and might be regarded as security for it. This is a far-fetched reason, which shows how far it was deemed proper to go to prevent a failure of justice. In the United States there have been some incidental recognitions of the doctrine of *Holmes v. Kerrison*; *Thrall v. Mead*, 40 Vt. 540, *Stanton v. Estate of Stanton*, 37 id. 411, and *Wolfe v. Whiteman*, 4 Harr. (Del.) 246, appear to adopt it. In New York there are dicta to the same effect in *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Bruce v. Tilson*, 25 N. Y. 194, and *Howland v. Edmonds*, 24 id. 307. No such point arose in any of these cases, and the actual decision in each of them is, in our opinion, difficult to harmonize with any such principle. In *Morrison v. Mullin*, 84 Penn. St. 12, it was held that, where a demand was necessary to found

able in thirty days after its date, and that the statute then commenced to run thereon, unless a demand had been made thereon within six years from its date. In that case the note was dated Oct. 16, 1867, and was as follows: "Thirty days after demand, I promise to pay Jonathan Palmer fifteen hundred dollars, value received, without defalcation." No demand was made upon the note until May 22, 1874, from which date interest was allowed. The lower court held that the statute did not begin to run until thirty days after demand was made, and the plaintiff had a verdict, which, however, was set aside by the Supreme Court upon the ground that the note became due, and the statute commenced to run thereon, thirty days from the date of the note. "Taking this note," says CAMPBELL, J., "as it reads, and as it is established by the finding being payable without interest, it is impossible to assume that it was intended to run for any considerable time. The fair inference is, that it was given for some debt or other consideration on which an immediate liability existed, which the maker of the note expected to be ready to meet on reasonable notice, which was fixed at thirty days. If the note had been negotiable, and indorsed over, any long delay to present it would unquestionably have released the indorser.

"If the judgment is correct, it can only be so because, by the terms of the contract, the holder had a right to postpone the maturity of the debt so long as he chose to do so. For if the debt did not become payable until fixed by demand, and the demand was optional with the creditor, no tender could be made which would bind him, and he could keep the debt alive in spite of the debtor for an indefinite period. If there was any infirmity in the consideration, or any defect in the binding character of the consideration, or any defect in the character of the obligation, he might retain it until all testimony was lost, and defeat the defence. This is the mischief which the statutes of limitation were intended to remedy. If this case is not within them, it is not because it ought not be covered by them." But this case, as well as the

an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay.

"We cannot but think this to be sound doctrine; whatever may have been the ancient prejudice against statutes of limitation, they are now regarded as just, and entitled to be fairly construed. If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own

act fix the time of payment. It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract, and where a speedy demand would manifestly violate its intent. But where no delay is contemplated, the rule is just and reasonable; and the presentment should be reasonably prompt, or the creditor should be subjected to the operation of the statute."

Pennsylvania case, relied upon by the court,¹ are put upon the equitable ground of laches, and cannot be said to express a strictly legal rule. Even though the Michigan case could be said to express, in the view of the court, a strictly legal rule, it can be entitled to little weight in view of the recent decision of the English courts of a similar question adversely to their views,² and also in view of the fact that the Supreme Court of Maryland, which deservedly ranks among the first courts in this country in point of learning, ability, and authority, has also held, in conformity with the doctrine previously stated in the text, that, where a note or contract is payable or to be performed a certain number of days, weeks, months, or years after demand, a right of action does not accrue, or the statute begin to run, until after demand.³

¹ *Morrison v. Mullin*, 34 Penn. St. 12; also *Pittsburgh, &c. R. R. Co. v. Ryers*, 32 id. 22. This doctrine works a practical abrogation of the contract of the parties, and, in our judgment, is a misapplication of the statutes, and one never contemplated by the legislature. When a person gives a note payable one day after demand, a term of credit is thereby agreed upon, optional with the creditor, and subject only to the single condition that he shall give the debtor one day in which to raise the necessary funds; and this contract being within the power of the parties to make, is binding upon them. For the courts to say that the creditor is bound to make this demand within the time prescribed for the limitation of the debt, if no condition existed, and that upon a failure to do so he shall lose his right to recover the debt at all, is not a fair application of the statute to the contract actually existing, but is an assumption of authority by the court not only to make a new contract for the parties, but also to improvise a statute of limitations to cover a case not contemplated by or embraced in that created by the legislature. It is true that the purpose of the statute is to discourage stale demands, but it was not intended to prevent the parties from agreeing upon any term of credit, however long. The intimation that delay upon the creditor's part to make demand within a certain time operates as a virtual fraud upon the debtor is too absurd to demand notice. If the debtor desires to pay the debt at any time, he can do so; and if he fails to do so within six or any other number of years, the reasonable presumption is that it was

because it was inconvenient for him to do so; and yet the application of the doctrine stated in the Michigan case imposes a penalty upon the creditor, to wit, the loss of his debt, because he has extended to the debtor the accommodation he desired, and that too when the debtor retained the money free from interest. As, however, the doctrine embodied in this case is opposed to all the authorities which may be regarded as authoritative, and, in our judgment, is an erroneous construction of the contract of the parties, and has no foundation in reason or principle, we will not pursue the matter further. *Thorpe v. Booth*, Ry. & M. 388; *Sutton v. Loomer*, 7 B. & C. 416; *Sturdy v. Henderson*, 4 B. & Ald. 592; *Clayton v. Gosling*, 5 B. & C. 360. In *Wolfe v. Whiteman*, 4 Harr. (Del.) 246, it was held that a note payable "on" or "after sight" did not become payable until after demand is made for payment. In *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267, it was held that a note payable at a given time after demand, is actually made, and that the statute does not begin to run until demand is actually made. See also *Wright v. Hamilton*, 2 Bailey (S. C.), 51. In *Little v. Blunt*, 9 Pick. (Mass.) 488, countenance is also given to this doctrine. See *post*, chapter on BILLS AND NOTES.

² *Brown v. Rutherford*, 49 L. T. N. S. 659.

³ *Rhind v. Hyndman*, 54 Md. 548. In this case, BARTOL, C. J., in the course of an able opinion, in which he critically reviews the cases, and the grounds upon which they stand, says: "To determine the second question we must refer to the

In that case A., B., and C., by a contract made jointly with D., on the 29th of March, 1875, agreed, for the consideration stated therein, to

language of the statute. This provides that 'the action shall be commenced or sued within three years from the time the cause of action accrues.' 1 Code, art. 57, § 1. The contract sued on in this case was to be performed 'on or after the fifteenth day of October, 1875, when the same should be demanded.' The cause of action therefore did not accrue until demand was made. According to the terms of the statute, limitations would begin to run from that time. This has been repeatedly decided.

In *King v. Mackellar*, 109 N. Y. 215, it happened that in 1871, plaintiff, a woman of limited means, and a cousin of the defendant, intrusted to him \$3,000, under an agreement that he should invest the same for her upon bond and mortgage. The defendant had previously purchased certain property in the city of New York, and taken the title in his wife's name. He was at the time negotiating an exchange thereof with one S. for other lands. The defendant's wife conveyed the lots to the wife of S., who in turn conveyed to the defendant's wife such other lands and executed to her a bond, secured by a mortgage of \$3,000 upon the New York lots, subject to a prior mortgage of \$6,000. After the exchange had been consummated the defendant caused his wife to execute an assignment to the plaintiff of the \$3,000 mortgage, and he retained the \$3,000 so intrusted to him. The mortgage was recorded but the assignment was not. None of the papers were exhibited or delivered to the plaintiff, and she had no information of the transactions until 1878. In an action to foreclose the prior mortgage the defendant's wife was made a party defendant, as the recorded holder of the second mortgage, and she appeared by their son, a lawyer. Upon the sale in the foreclosure suit, which occurred in 1877, there was a deficiency, and the lien of the second mortgage was extinguished except as to about twenty feet of the rear of the lot. Early in 1878, when plaintiff had learned the above facts, the defendant promised to protect her from loss, and he obtained from the wife of S. a deed conveying the

twenty feet not covered by the first mortgage to a relative of the plaintiff, as for security. This deed, with the bond and mortgage and assignment, were handed over to the plaintiff late in the year 1878; but she shortly after returned them to the defendant with a demand for a repayment of her money. Defendant had, down to 1878, collected and paid the plaintiff the interest on the mortgage. In an action brought to recover the \$3,000, the trial judge found that plaintiff was ignorant of the forms and methods of making such investments, and relied wholly upon the defendant, and that the obligor in the bond secured by the second mortgage had no separate or other estate, except that conveyed to her in the exchange of properties between defendant and her husband. Upon the trial, the plaintiff made a tender, without objection being made, of a deed of the twenty feet. It was held that the plaintiff was entitled to recover; that there was, in fact, no investment of the money as agreed, but that if the assignment of the mortgage could be considered as an investment, it was an improper and an insecure one, and so was without the scope of defendant's agency, and could be treated by the plaintiff as null; also, that there was no ratification by the plaintiff of defendant's acts, and no waiver of her right of action; and that the plaintiff's right of action arose when she, with knowledge of the facts, elected to revoke the defendant's authority and to disaffirm his acts, and upon her demand for a return of the money, from which time the statute of limitations only began to run.

No demand was alleged in the complaint; but demand was proved without objection, and there was no demurrer to the complaint. Held, that the omission of the averment was not available as an objection here; also, that it would have been competent for the court to admit evidence of demand on the trial, if objection had been raised, allowing an amendment of the complaint. The fact that the complaint states matters belonging to the province of the trial, i. e., details of proof showing the sham or mock nature of the

transfer to D., on or after the fifteenth day of October, 1875, shares of certain stock sufficient to amount to \$500, at the market price of said stock, when the same should be demanded. A demand for the transfer was made July 11, 1878, and the action was brought June 19, 1879. Under the Maryland statute of limitations actions upon simple contracts are barred in three years. The defendant set up in this plea "that

alleged investment and the methods adopted by the defendant to disguise his retention of the money, did not constitute a material defect.

The provision of the code declaring that when a right of action exists, growing out of the receipt or detention of money by a "person acting in a fiduciary capacity," the time within which an action must be commenced "must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends," created no new rule of law, but was simply a codification of the law as it then existed.

"In *Holmes v. Kerrison*, 2 Taunt. 323, in the King's Bench, the note sued on was payable after sight; it was held that suit was not barred till six years after it had been presented for payment. A similar decision was made in *Topham v. Bradick*, 1 Taunt. 571 (in the Common Pleas). These decisions were followed by *Thorpe v. Combe*, 8 Dow. & Ry. 347, where the note, dated in 1810, was payable two years after demand. It appeared that demand was made on the eighteenth day of June, 1823. BAYLEY, J., said: 'I am clearly of opinion that the statute of limitations did not begin to run until two years after demand of payment of this note had been made. Here the cause of action did not arise until the two years after demand had elapsed, and consequently the statute affords the defendant no protection.' The other judges concurred.

"The doctrine of *Holmes v. Kerrison* has been often recognized in this country. *Stanton v. Estate of Stanton*, 37 Vt. 411; *Thrall v. Mead*, 40 id. 540; *Little v. Blunt*, 9 Pick. (Mass.) 49; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Wolfe v. Whiteman*, 4 Harr. (Del.) 946. Other cases might be cited. In *Fells' Point Savings Institution v. Weedon*, 18 Md. 326, on a certificate of deposit payable on demand, it was said, 'the statute began to run when demand was made.'

In support of a different doctrine, the counsel for appellees have cited several cases, in which it has been held that where the contract is to be performed on demand, if the demand be unnecessarily delayed beyond the time limited by the statute, the action will be barred. Thus, in *Pittsburgh & Connellsville R. R. Co. v. Ryers*, 32 Penn. St. 22, which was a suit to recover upon a subscription to stock, the court said, although the statute of limitations does not begin to run against a subscription to the stock of a railroad company till after calls are made for instalments, yet when no call is made for more than six years from the date of the subscription, the law will presume an abandonment of the enterprise, and, from analogy to the statute, bar the recovery. So in *Morrison v. Mullin*, 34 Penn. St. 12, it was decided that 'where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay.' That decision was followed and approved in *Palmer v. Palmer*, 36 Mich. 487.

"The cases in Pennsylvania and Michigan were not strictly decisions at law on the construction of the statute; they were decided by courts exercising equitable jurisdiction, and consequently stand upon different grounds, like *Codman v. Rogers*, 10 Pick. 112, and *Little v. Blunt*, 9 id. 490, cited by the appellees, where the equitable doctrine of laches was applied. In *Little v. Blunt* the legal rule was recognized. The court say, 'But if the promise had been of a collateral thing, which would create no debt until demand, it might be otherwise. It is clear that where no action will lie without a previous demand . . . in all such cases no cause of action accrues until after demand made, and the statute of limitations will begin to run from the time of the demand, and not from the time of the promise. This distinction is obvious and will reconcile all the cases.' "

the said stock was demandable by the said plaintiff immediately after the fifteenth day of October, 1875, and it was the duty of the plaintiff to demand the same within a reasonable time after said fifteenth day of October, and more than three years expired after the end of such reasonable time for making said demand and before the bringing of this suit." To this plea the appellant demurred, the demurrer was overruled, and judgment entered for the defendants, which was reversed by the Supreme Court, upon the ground that the right to demand the stock was not barred by the lapse of three years before the same was made, and that the statute did not begin to run upon the claim until demand was made.

The statute does not begin to run in favor of a bailee, or of a person who borrows goods for an indefinite time until he denies the bailment and converts the property.¹ Nor does it run against an action by the mortgagor of chattels to redeem until the possession of the mortgagee becomes adverse, and this is so although an action for the debt secured by the mortgage is barred.² The statute does not begin to run in favor of the borrower of stock until after the demand is made,³ nor against the right of the owner of stock to the dividends thereon.⁴

Where a contract is made to do an act which it is evident it was not intended by the parties should or would be done until certain other things were done, the statute does not begin to run until a reasonable time after such other things are done. Thus, where a railroad company agreed with a land-owner to construct a crossing so as to enable the owner of land cut off from the rest of his tract by the company's proposed road to reach it for the purposes of cultivation, to construct such crossing, and in an action for the breach of such contract set up the statute of limitations as a bar, it was held that the statute did not begin to run upon the contract until a reasonable time after the railroad was constructed.⁵

Where a note is made payable in a specified time, containing a provision that it shall become due when certain things are done, it does not become due, nor does the statute begin to run, until such things are done, whether the six months named in the note have elapsed or not.⁶

Where an accommodation maker of a note pays it or a part of it, his right of action against the payee accrues at the time of such payment, and the statute begins to run from that time.⁷

Dividends which are declared on stock in a corporation are payable on demand, and the statute does not begin to run against the person entitled thereto until demand is made.⁸

¹ Reizenstein v. Marquardt, Iowa, 1892.

² Shucraft v. Beard, Nev. 1892.

³ Parker v. Gains (Ark.), S. W. 693.

⁴ Louisville Bank v. Gray, 84 Ky. 565.

⁵ International, &c. R. R. Co. v. Pape, 73 Tex. 501.

⁶ Robertson v. Cates (Tex.), 12 S. W. 54.

⁷ Frank v. Brewer, 7 N. Y. S. 92 ;

⁸ Goodenough v. Wells, 76 Iowa, 774 ; Harvey v. I. & S. Co., 60 Vt. 209.

⁹ Arnaut v. New Orleans, &c. R. R. Co., 41 La. An. 1020.

So where property is in the hands of one tenant in common, as his possession is treated to be the possession of his co-tenant, the statute does not begin to run until the co-tenant has made a demand for his share of the property, or his rights have been denied.¹

So where property has been loaned to another, the statute does not begin to run until its return has been demanded.²

As to the right to recover stolen property, the same rule prevails, because until such demand the possession is, in contemplation of law, in the owner.³

Upon a deposit of money to be accounted for on request or payable on demand, the statute does not begun to run until demand is made.⁴

And the same is true where money is loaned under a contract that it shall be payable after notice of intention to withdraw it. The statute does not begin to run against the lender until demand is made therefor.⁵

Where a contract or note is payable in specific articles or in services or in anything but money, the statute does not begin to run until demand for payment is made.⁶

Where a note is payable a certain number of days after the happening of a certain event, the statute does not begin to run until the promisee has actual knowledge or notice of the happening of that event, or until such time when by the exercise of ordinary diligence he ought to have had notice thereof.⁷

SEC. 119. General Rules as to when there is a Condition Precedent.—By sec. 3 of the statute of James it is enacted that the different periods within which the remedies for the cases provided for are to be pursued are to be reckoned (except as to slander) from the time the respective causes of action accrue, and this is the provision in all of our statutes, except that no exception is made as to actions for slander.⁸ This would, undoubtedly, be so independently of the statutory provision.

¹ McClure v. Colyear, 80 Cal. 378.

² Fry v. Clow, 50 Hun (N. Y.), 574; Rives v. Nye, 44 N. W. (Neb.) 736.

³ Duryea v. Andrews, 58 Hun (N. Y.), 607.

⁴ Sheldon v. Sheldon, 58 Hun (N. Y.), 601. The statute will not begin to run against a claim for interest on deposits, agreed to be credited semi-annually by the bank, until notice is given to the depositor that the bank has ceased to credit such interest. Marion National Bank v. Fidelity, &c. Co., 12 Ky. L. R. 492. It has been held in Vermont that a check drawn upon a bank for the whole balance shown on a deposit book, is not a demand upon a bank for the amount of the overcharge for a check previously drawn which will set the statute running against an ac-

tion to recover such an overcharge. Goodell v. Brandell Nat. Bank, 21 Vt. (Atl.) 956. In Massachusetts, it has been held that the statute does not begin to run in favor of a bank in which deposits are made until there has been something equivalent to a refusal on the part of the bank to pay or a denial of liability. Dickenson v. Leominster Savings Bank, 152 Mass. 49.

⁵ Atkinson v. Bradford, &c. Society, L. R. 25 Q. B. D. 377.

⁶ Weymouth v. Gile, 83 Me. 437.

⁷ Hall v. Roberts, 58 Hun (N. Y.), 539.

⁸ Banks v. Coyle, 2 A. K. Mar. (Ky.) 564; Hull v. Vandergrift, 3 Binn. (Penn.) 374; Jones v. Conway, 4 Yeates (Penn.), 109; Oden v. Greenleaf, 3 N. H. 270; Richman v. Richman, 10 N. Y. L. 114; Raymond v. Simonson, 4 Blackf. (Ind.)

It becomes, therefore, necessary in each case to consider, with reference to the statutes of limitation, at what time the cause of action

77; *Mayfield v. Seawell, Cooke* (Tenn.), 437; *Stewart v. Durett*, 37 B. Mon. (Ky.) 113; *Hardee v. Dunn*, 13 La. An. 161; *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94; *Ferris v. Williams*, 1 Cranch (U. S. C. C.), 475; *Davis v. Eppinger*, 18 Cal. 378. This is substantially the rule of the civil law, as under that prescription does not begin to run until the creditor has a full and perfect right to prosecute his demand. *Evans's Pothier*, 404. This rule prevails equally at law and in equity. 2 *Story's Eq. Juris.* § 1521 *a*. In *Bruce v. Tilson*, 25 N. Y. 194, the court held that the statute begins to run from the time when the plaintiff might have brought his equitable action, and is charged with notice that his right is denied. Time will commence to run in the defendant's favor from the date when a cause of action accrued, even although from any cause, such as poverty of the defendant, an action would then have been fruitless. *Emery v. Day*, 1 C. M. & R. 245. And a cause of action accrues when work is done, although it may be that the parties cannot get satisfaction until afterwards, *Wormwell v. Hailstone*, 6 Bing. 668; though of course it may be otherwise where there is a special contract as to time of payment, *Wittersheim v. Lady Carlisle*, 1 H. Bl. 631. So in cases of mistake, time runs from the date of the mistake, not from the date of discovery. Thus, when a personal representative found among the papers of the deceased a mortgage deed, and assigned it more than six years before the action for the mortgage money, reciting in the deed of assignment that it was a mortgage deed made, or mentioned to be made, between the mortgagor and mortgagee for that sum, the assignee was not allowed to recover, although it turned out that the mortgage deed was a forgery, and the assignee did not discover the forgery until within six years before the action. *Bree v. Holbech*, 2 Doug. 634. When a right becomes complete, a right of action accrues, and from that time—and only from that time, except in cases where a statutory disability exists, or the claim is brought under some of the

statutory exceptions—the statute begins to run. *Richman v. Richman*, 10 N. J. L. 114; *Banks v. Coyle*, 2 A. K. Mar. (Ky.) 564; *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Jones v. Conway*, 4 Yeates (Penn.) 109; *Mansfield v. Seawell, Cooke* (Tenn.), 437; *Odin v. Greenleaf*, 3 N. H. 270; *Hardee v. Dunn*, 13 La. An. 161; *Hall v. Vandergrift*, 3 Binn. (Penn.) 374; *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94. Whenever the contract of the defendant is not absolute in the first instance, for the performance of some particular act or duty, but is dependent upon some condition precedent, or something to be done on the part of the plaintiff or some third person, the cause of action does not arise until the condition has been accomplished, because, until those events occur, no right to sue exists. *Fenton v. Emblees*, 1 W. Bl. 353; *Savage v. Aldren*, 2 Stark. 232. So where a bond or other obligation is given, payable after the death of a certain person named, the statute does not begin to run until such person's decease, no matter how long a time may have elapsed since the bond or obligation was executed. *Tuckey v. Hawkins*, 4 C. B. 664; *Sanders v. Coward*, 15 M. & W. 56. So where a contract for services provides that payment shall be made by a provision in the employer's will, a right of action does not accrue until after the employer's death, because up to that period there has been no breach. *Nimmo v. Walker*, 14 La. An. 581. And so generally, when a party stands in a position that he can enforce a claim by an action at law, the statute from that moment attaches and begins to run thereon. *Amott v. Holden*, 22 L. J. Q. B. 19; *Blair v. Ormond*, 20 id. 452; *Whitehead v. Lord*, 21 L. J. Exch. 239; *Bill v. Lake*, Hetl. 138; *Howland v. Cuykendall*, 40 Barb. (N. Y.) 320; *Bowler v. Elmore*, 7 Gratt. (Va.) 385. When a particular date for the completion of a contract is agreed upon, a right accrues at that date. *Helps v. Winterbottom*, 2 B. & Ad. 431; *Shutford v. Borough*, Godb. 438; *Irving v. Veitch*, 3 M. & W. 110; *Wittersheim v. Carlisle*, 1 H. Bl. 635.

arose, — a question which is not seldom one of difficulty. Adopting the rule that a cause of action, or, as perhaps should be said, a complete cause of action, is the necessary point of commencement, time will not commence to run in case of a contingent promise until the event has happened on which the contingency depends. Thus it is said by a writer, whose quaint yet instructive illustrations are valuable, that if a man promise to pay £10 to J. S. when he is married or when he comes from Rome, and ten years after J. S. is married or returns from Rome, the right of action accrues upon the happening of that contingency, and from that time the statute will commence to run, and not from the earlier date of the promise.¹ The rule may be said to be,

¹ Bac. Abr. Lim. 230, D. 3 ; *Savage v. Aldren*, 2 Stark. 232 ; *Fenton v. Emblers*, 1 W. Bl. 353 ; *Jones v. Lightfoot*, 10 Ala. 17.

In *O'Hara v. State of New York*, 112 N. Y. 146, it was held that in the case of an imperfect claim or obligation which is unenforceable by reason of some vice or defect therein, which may be cured or waived by the debtor, a right of action arises thereon at the time the claim becomes purged of the vice by the action of the debtor, and not before.

McDougall v. State, 109 N. Y. 80, distinguished. Thus, where a person has voluntarily furnished property or rendered valuable services to the State at the request of State officers and for State purposes, but with expectation of payment for the same, the legislature may ratify the acts of such officers, although previously unauthorized, and thus create a legal liability on the part of the State.

An act of the legislature, supplying defects or omissions in pre-existing legislation, whenever a liability may be predicated against the State, is not the audit or the allowance of a claim ; and so is not obnoxious to the provisions of the State constitution prohibiting the audit or allowance by the legislature, of any private claim or account against the State.

Upon a claim filed against the State for services performed and materials furnished under the direction of the quarantine officials in the years 1875 and 1876, in the repair of steamers and other property of the State used for quarantine purposes in the harbor of New York, it appeared that the claimant brought suit against the

health officer for the amount of the claim, and was defeated upon the ground that that officer had incurred no personal liability, and that the claim was against the State. Thereupon, in 1878, claimant filed his claim against the State before the Board of Audit which, upon a hearing thereon, decided that the State was not liable therefor, and so dismissed the claim. Application was thereafter made each year to the legislature for relief up to 1886. In that year an act was passed authorizing the Board of Claims to rehear, audit, and determine the claim, and to award such sums as should be a reasonable compensation for the work and services. It was held that this act was not violative either of the Constitutional provision above referred to or of the provision prohibiting the legislature or any person acting in behalf of the State from auditing, allowing, or paying any claim which, as between citizens, would be barred by lapse of time ; that prior to the passage of said act of 1886 no legal claim, enforceable in any court, existed against the State for the demand in question ; that by said act the action of the quarantine officials was adopted and approved, and so for the first time the claim had a legal existence against the State, and the cause of action then arose ; and that the value of the materials furnished, constituted a part of the claim, was fairly within the spirit of the act, and was properly allowed.

In *Budd v. Walker*, 113 N. Y. 637, in an action for an accounting as to moneys alleged to have been placed in the hands of S., the defendant's testator, by the plaintiff for investment, the only evidence presented was a letter from S. to the plain-

that whenever the contract of the defendant is not absolute in the first instance, because of something to be done by the plaintiff or some third person as a condition precedent, the cause of action does not arise until the condition has been accomplished or the precedent act performed.¹ In such cases the cause of action does not commence from

tiff, which after acknowledging the receipt of the money and that it was drawing interest at seven per cent, continued as follows: "If I can find an opportunity of purchasing a mortgage . . . where I can, without risk, secure a greater profit, I shall do so, unless you wish to make any other use of the money; should you desire to use it, please let me know." It was held that the relation of the plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust, that the amount was payable at once and the statute of limitations then began to run, and after the lapse of six years was a bar to the action.

In *Thacher v. Hope Cemetery Ass'n*, 126 N. Y. 507, the defendant, a cemetery association, borrowed moneys of various persons, issuing to them certificates, by which, after certifying that the persons named each had, at the date thereof, loaned to it the sums stated, it agreed that one-half of the proceeds of sales of lots in its cemetery should be applied to the payment of the sum loaned and interest. With the moneys so borrowed it purchased land, laid it out into lots, and improved it as a cemetery. In an action upon one of the certificates it appeared and was found that the defendant received from the sales of lots, a sufficient sum, applicable by the terms of the certificate to its payment, more than ten years before the commencement of the action. It was held that the action was barred by the statute of limitations, and this, although the court found that neither S., the plaintiff's testator, to whom the certificate was issued, nor the plaintiff had knowledge more than six years before the action was commenced of the facts as to the receipt of money applicable to the payment of the loan; that by the terms of the certificates the defendant did not become a trustee for the holders, and no trust was created of any kind; but assuming they did not create a general obligation to pay the sums borrowed, as to which *quære*, but only created an obligation to pay the loan out of

moneys received from the sale of lots, such moneys did not in any sense belong to the holders of the certificates, but belonged to it, and when it failed to apply the proceeds as stipulated, it became liable to an action at law for breach of its contract obligations, and such an action was barred by the statutes after six years. If, from facts peculiar to the case, an equitable action could have been commenced, it would have been necessary to commence it within ten years from the time the cause of action accrued.

¹ *Savage v. Aldren*, 2 Stark. 232; *Fenton v. Emblers*, 1 W. Bl. 353. In *Cape Fear, &c. Co. v. Wilcox*, 7 Jones (N. C.) L. 481, a statute incorporating a company gave the company a remedy for the recovery of subscriptions by a sale of the stock any time within three years after assessment, and then by a suit for the balance due. The court held that a right of action did not accrue until after a sale of the stock, and that then the company had three years to commence its action in. See also *Cape Fear, &c. Co. v. Casten*, 63 N. C. 264. So where a person promises to pay any balance that may be due from him, the statute begins to run from the date of the promise, and that, too, although the statute had nearly run upon the claim. In such a case the running of the statute arrests the operation of the statute, and it takes a fresh start from that time. *Lance v. Parker*, 1 Mill (S. C.) Const. 168. Where the payee of a note receives from the maker negotiable securities as collateral, as a note and mortgage, payment of the debt secured by the mortgage by the person against whom the mortgage exists, to the person so holding the note, if it exceeds the debt for which it was pledged, operates as an extinguishment of the debt for which it was pledged as collateral, and the pledgee holds the balance as trustee for the pledgor, and the statute does not begin to run in favor of the pledgee until demand has been made therefor by the pledgor. *Ponce v. McElvy*, 47 Cal. 154. In *Handy v. Draper*,

the date of the contract, but from the accomplishment of the condition.¹ Thus, if a debt is contracted, to be paid from the proceeds of certain property when sold, or when certain obligations have been collected, the right of action does not accrue until such property is sold or obligations are collected, as the case may be; so if A. agrees with

89 N. Y. 334, reversing 23 Hun, 256, a creditor of a corporation organized under the general manufacturing act cannot maintain an action against a stockholder to enforce the liability to creditors, imposed by said act until he has obtained a judgment upon his claim against the corporation, and an execution has been issued thereon and returned unsatisfied. The statute of limitations, therefore, does not begin to run in favor of a stockholder until after the return of the execution against the corporation. In *Brown v. Tyler*, 8 Gray (Mass.), 135, the plaintiff held a mortgage upon lands of the defendant to secure a debt due from the defendant to him, and at the defendant's request assigned it to a bank to secure a loan procured from it by the defendant. The debt to the bank was not paid, and it foreclosed the mortgage and sold the lands two years afterwards, and applied the proceeds on the defendant's debt. The plaintiff brought an action against the defendant for money paid to his use, and the defendant set up the statute of limitations. The court held that the statute began to run from the sale of the land and the conversion of the mortgage debt into money, and not from the time of foreclosure, and consequently that the debt was not barred. This principle is well illustrated in a case where the holder of a note delivered it to his creditor as collateral security for a mutual account current, with leave to apply thereto any sum collected on the note. When a dividend from the estate of the maker, in insolvency, became due, the creditor collected it, as agent of the debtor, and applied it on the account. It was held that the statute did not begin to run on the account until the date of such last item. *Whipple v. Blackington*, 97 Mass. 476. Where a person deposits money with another, to be retained by him until demanded, a continuing trust is thereby created, which is not ended until the money has been demanded by the depositor. *Schroeder v. Johns*, 27 Cal. 274. Upon a writing as

follows: "This is to show that half the hire of R. hired to B. is J.'s," — it was held that no right of action accrued until a demand had been made, and consequently that the statute ran only from the date of demand. *Jones v. Woods*, 70 N. C. 447.

¹ *Sanders v. Coward*, 15 M. & W. 56. In *Turkey v. Hawkins*, 4 C. B. 664, the plaintiff's declaration was framed upon a bond not setting forth any condition. The defendant set up the statute of limitations, and upon issue joined it appeared that the bond was executed more than twenty years before action brought, but that it was a *post obit* bond for the payment of a sum of money after the death of a person named, who, it was proved, had died within twenty years from the bringing of the action; and it was held that, as the cause of action did not accrue until the death of the person named, the action was not barred. *Blair v. Ormond*, 20 L. J. Q. B. 452; *Amott v. Holden*, 22 id. 19.

Lee v. Horton, 104 N. Y. 538.

H., the defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life interest, with remainder over to his heirs. H. died leaving an heir. In an action to recover the sum specified, held that, as the condition of the instrument, if carried out, would cause the fund to fall into the estate of H., subject to administration, it would result in an unlawful disposition of the money, and so it was illegal and void; that the money was repayable at the death of H., irrespective of the question whether he left heirs or not; and that the plaintiff was entitled to recover. And that the cause of action did not accrue until after the death of H., the statute of limitations did not begin to run until then, and, as the action was brought within the time limited after such death, it was not barred.

B.¹ that if he will pay a certain demand which A. is bound to pay, he will pay him, a right of action does not accrue until B. has paid the demand.² So where a person agrees to pay for property purchased after the decease of a certain person, a right of action does not accrue until after such person's decease;³ and generally, when the payment of a claim or the liability of a party is made dependent upon the performance of any condition precedent or the happening of any contingency, a right of action does not accrue, or the statute begin to run, until the performance of such condition or the happening of such contingency.⁴

Where A. agreed to pay B. a certain sum in case he succeeded in a certain action, it was held that the statute did not begin to run until the successful termination of the action, although A. died before the suit was terminated and an administrator had been appointed.⁵ So where a reward is offered for the arrest and conviction of a criminal, or for evidence that will lead to his conviction, the statute does not begin to run until a conviction is had.⁶ In a Massachusetts case,⁷ the defendant, on March 25, 1835, acknowledged in writing the receipt by him of certain property from the plaintiffs, who were assignees for the benefit of creditors of an insolvent debtor, and promised to pay for the property on demand; it being stipulated, however, that demand should not be made until the assignees had made up their account previous to declaring a second dividend under the assignment. The defendant, in 1836, brought a bill in equity against the plaintiffs as assignees of such debtor, which was pending until some time in March, 1847, and during its pendency prevented the plaintiffs from preparing the account for a second dividend. The plaintiffs made a demand, and at the same time pre-

¹ *Scott v. Osborne*, 2 Munf. (Va.) 413.

² *Moore v. Caldwell*, 8 Rich. (S. C.) Eq. 22.

³ *Thompson v. Gordon*, 3 Strobb. (S. C.) 196.

⁴ In *Morgan v. Plumb*, 9 Wend. (N. Y.) 287, a note was made payable when a certain mortgage held by the maker should be collected. It was held that while the payment of the note was contingent, yet, when the mortgage entered into possession under foreclosure proceedings, the mortgage must be treated as collected, and consequently the note became due from that time. *Van Hook v. Whittock*, 3 Paige (N. Y.) Ch. 409.

In *McMaster v. State of New York*, 103 N. Y. 547, it was held that contracts made under and in pursuance of the act of 1870, organizing "the Buffalo State Asylum, for the insane" for furnishing materials for the construction of buildings,

were not abrogated by the provisions in the appropriation bills of 1874 and 1875 in reference to that institution; and that where a claim against the State for damages for breach of contract for furnishing building materials was presented more than six years after the passage of the act of 1875, but within six years after breach of the contracts on the part of the officials having charge of the work, that the claim was not barred by the statute of limitations.

⁵ *Burton v. Lockert*, 9 Ark. 411. In *Bowles v. Elmore*, 7 Gratt. (Va.) 385, it was agreed between the maker and holder of a note that the maker should keep it until his liability, as bail for the holder was determined; and it was held that the statute did not begin to run until the maker's liability, as bail, had ceased.

⁶ *Ryer v. Stockwell*, 14 Cal. 134.

⁷ *Emmons v. Hayward*, 6 Cush. (Mass.) 501.

sented their account May 23, 1848. In an action upon the agreement the defendant set up the statute of limitations, and claimed that the demand was not made upon him within a reasonable time; but the court held that, as the defendant controlled the happening event upon which the right to make a demand depended, and by his own act had postponed it, he was estopped from claiming that the demand was unreasonably delayed, and that the statute did not begin to run until the demand was made.¹

Where a person consented to pay the expenses of a suit, in consideration of the promise of another person to pay a part of them "when ascertained," it was held that the statute did not begin to run until the promisee had actually paid the expenses.² So where an attorney agreed to prosecute a claim, collect it, and take his pay out of the amount collected, it was held that the statute did not begin to run until the claim was collected.³ But, in order to postpone the running of the statute upon a claim payable upon a contingency, the contingency must be such as postpones or suspends the right of action, or the statute will run from the date of the contract.⁴ The same rule prevails where the law raises or implies a condition, as in the case of money deposited in a bank;⁵ and in such cases the statute does not begin to run until the implied condition has been performed.

SEC. 120. Contracts for Services. — Under an ordinary contract for services for a stated period, whether long or short, no time for payment being agreed upon, the right of action accrues immediately upon the completion of the term of service.⁶ But if services are rendered for

¹ In Pennsylvania, it is held that, where a demand is necessary to complete a right of action, it must be made within six years from the date of the contract. *Morrison v. Mullin*, 34 Penn. St. 12. But we do not apprehend that even this rule militates against the doctrine of the Massachusetts case, because in that case a demand could not be made until the event transpired upon which the right to make it depended. Nor, indeed, can the doctrine of the Pennsylvania case be applied where the demand in express terms is postponed for more than the statutory period, as, to a note payable "ten years after demand, demand not to be made for ten years," because the express terms of the contract must control.

² *Darwin v. Smith*, 35 Vt. 69. See also *Perkins v. Littlefield*, 5 Allen (Mass.), 370, where a judgment was confessed for a sum to be assessed by the clerk, it was held that the statute did not begin to run until the sum was so ascertained. *Wills v. Gibson*, 7 Penn. St. 154.

³ *Morgan v. Brown*, 12 La. An. 157.

Where a note is given, payable in "stonework," the note is not due until the work is called for. *Lincoln v. Purcell*, 2 Head (Tenn.), 143.

⁴ *Motley v. Montgomery*, 2 Bailey (S. C.), 544. Upon a loan of money to be repaid on demand, the statute runs from the date of the loan. *Cook v. Cook*, 19 Tex. 434.

⁵ *Payne v. Gardner*, 29 N. Y. 146.

⁶ *Bill v. Lake*, Hetl. 138; *Wood's Master and Servant*, § 83; *Little v. Smiley*, 9 Ind. 116; *Zeigler v. Hunt*, 1 McCord (S. C.), 577; *Rankin v. Woodworth*, 3 Penn. St. 48; *Van Horn v. Scott*, 28 id. 316.

In *Brundage v. Village of Port Chester*, 102 N. Y. 494, the plaintiff made a demand upon the defendant's treasurer for the payment of an indebtedness due from the defendant to him for work and labor. This the treasurer refused unless the plaintiff would consent to deduct from the sum due him the amount of an illegal assessment upon his property, which assessment had been set aside. The plaintiff con-

several years under a general agreement, and no term of service is agreed upon, it will be treated as a hiring from year to year, and the wages will become due and the statute begin to run as to each year's service at the end of each year.¹ If a person is employed by the day, week, or month, and is to be paid therefor at the end of each day, week, or month, a right of action accrues, and consequently the statute begins to run at the end of each day, week, or month, as the case may be, and will bar that part of the wages which accrued more than six years before the action was brought, although the service continued for several years.² If under a contract to build a house, vessel, or in fact to do any species of work, extra services are rendered or extra expense is incurred for which the party is entitled to have extra compensation, and no time of payment for such extra work, &c., is agreed upon, the statute commences to run against the claim for such extra work, &c., from the time when the work is completed.³ If services are rendered on a promise that certain property, or a certain amount of property, shall be devised to the person rendering them, by the will of the person for whom they are rendered, a right of action for such services does not accrue until after the death of the promisor;⁴ and it has been held

sented to accept such balance, which was paid to him. In an action brought more than six years thereafter, in form to recover back the amount so deducted, as for money had and received by the plaintiff for the defendant, held, that the plaintiff's only cause of action was for the balance of the original indebtedness, which was not discharged by the action of the treasurer, but was barred by the statute of limitations.

¹ *Davis v. Gorton*, 16 N. Y. 255. In this case the plaintiff rendered services for the defendant for thirteen years, in the management of a farm, under a general agreement in which the price, but not the term of service, was fixed. The court held that the hiring was to be treated as a general hiring from year to year, compensation becoming due at the end of each year, and that a recovery could only be had for wages that had accrued within six years from the commencement of the action. But if continuous services are rendered under an entire contract, as for two, five, or any number of years, and no time for payment is fixed, the statute does not begin to run until the termination of the relation between the parties. *Schack v. Garrett*, 69 Penn. St. 144. In *Hall v. Wood*, 9 Gray (Mass.), 60, in an action for work and labor, the bill of particulars contained some items which bore date more than six years before the com-

mencement of the action. The court held that an action might be maintained for the full amount, notwithstanding the statute of limitations, if the whole work was done under an entire contract.

In re Gardner, 103 N. Y. 533, it was held that where one person enters into the employment of another without any express agreement as to the time of service or measure of compensation, in the absence of any proof of usage, it is to be considered as a general hiring; but no agreement can be implied that compensation shall be postponed until the termination of the employment; and where the employment has continued for a long period of time, and there are no mutual accounts between the parties, the statute of limitations is a bar to a claim for more than six years of services in such employment, unless it appear that payments have been made to apply thereon within the six years, in which case a recovery is proper for a period beginning six years prior to the first of said payments.

² *Butler v. Kirby*, 52 Wis. 62; *Davis v. Gorton*, 16 N. Y. 235; *Turner v. Martin*, 4 Robt. (N. Y. Superior Ct.) 661; *Mims v. Sturtevant*, 18 Ala. 359; *Phillips v. Bradley*, 11 Jur. 264.

³ *Peck v. New York Steamship Co.*, 5 Bosw. (N. Y. Superior Ct.) 226.

⁴ *Bash v. Bash*, 9 Penn. St. 260; *Price*

that even though the services contracted for are not completed, because the person is prevented by the promisor, the rule is the same, and the right of action does not accrue or the statute begin to run until the death of the promisor; but if the agreement as to the devise is not performed, a recovery may then be had from the estate of the deceased for the value of the services rendered.¹ But this is hardly believed to be the true rule, especially where the person employed under such a contract is wrongfully discharged from the service; and, in a late case in New York, it has been held that under such circumstances the servant's right of action upon *quantum meruit* accrues immediately upon the discharge, and is barred in six years from that date, and this would seem to us to be the true doctrine.² But if the contract is entire, and the employer has not in fact discharged the servant, but simply neglects to employ him, the remedy does not become complete until the contract is ended by the death of the employer.

Where a person who contracts to render services under an entire contract dies before the contract is completed, by the death of the servant the contract is ended; but a right of action does not accrue so as to bar an action for the wages, until an administrator is appointed upon his estate.³ But where a person employed under an entire contract is discharged before its completion, his right of action for wages already earned accrues at once;⁴ but his claim for damages does not accrue so as to become complete, and consequently so that the statute will run against it, until the term for which he was originally employed was ended; for while he may bring an action at once for such damages as he has sustained, yet he thereby waives all future damages, and he has a right to wait until the period is ended, and sue for the damages he has actually sustained from the breach of the contract.⁵ Where a contract to do a certain thing necessarily contemplates a reasonable time in which to do it, the statute does not begin to run until a reasonable time has elapsed; and as to what is a reasonable time is a question of fact for the jury.⁶ Where there is a contract for continuous service, and no time of payment is specified, the wages do not become due so that an action can be brought therefor until the service is ended, and the statute only begins to run from that time.⁷

SEC. 121. Rule as to Services of Attorneys. — This rule, as to entire

v. Price, Cheves (S. C.) Eq. 167; *Jilson v. Gilbert*, 26 Wis. 637; *Titman v. Titman*, 64 Penn. St. 486; *Riddle v. Backus*, 38 Iowa, 81.

¹ *Quackenbush v. Ehle*, 5 Barb. (N. Y.) 469.

² *Bonesteel v. Van Etten*, 20 Hun (N. Y.), 468.

³ *Carney v. Havens*, 23 Kan. 82.

⁴ *Bonesteel v. Van Etten*, *ante*.

⁵ See *Wood's Master and Servant*, sec. 125, p. 237, and authorities cited.

⁶ *Evans v. Hardeman*, 15 Tex. 480.

⁷ *Jones v. Lewis*, 11 Tex. 359; *Hall v. Wood*, 9 Gray (Mass.), 90. In *Littler v. Smiley*, 9 Ind. 116, it was held that there was no error in the following instructions: "If the plaintiff performed labor for the plaintiff's intestate, under an agreement to be paid therefor, without specifying at what time such payment should be made, or how long such labor should be performed, then the statute of limitations would not commence running until such labor was ended." *Schooner v. Vachon*, 121 Ind. 3.

contracts for services, is well illustrated in the case of attorneys. It is held that the statute does not run against an attorney's claim for professional services so long as anything remains to be done by him before final judgment in a case that he has in hand for his client, or so long as the relation of attorney and client exists in a case.¹ In Pennsylvania, it has been held that, where an attorney is employed to collect a debt, the statute does not run against his claim for services so long as the debt remains unpaid.² In New York, it is held that the statute begins to run upon his claim for services and disbursements whenever his services are so brought to an end that he can maintain an action for them.³ This point is held to be reached under a general employment when the suit is terminated by the entry of a final judgment;⁴ and this is so although there may be other charges incidental to the matter, in-

¹ *Walker v. Goodrich*, 16 Ill. 341; *Elliot v. Lawton*, 7 Allen (Mass.), 274; *Fenno v. English*, 22 Ark. 170; *Bathgate v. Haskin*, 59 N. Y. 538; *Davis v. Smith*, 48 Vt. 52. In *Noble v. Bellows*, 53 Vt. 185, D., an attorney, was indebted to B. The two entered into a contract, by which D. was to do B.'s law business at one-half the usual price, and B. was to let D. have all his business in one county, except what he should do himself. Soon after the execution of the contract D. formed a law partnership with N.; but this contract was not made known to him. B. broke his part of the contract by giving the greater part of his law business to another attorney, and only the smaller part to D. & N. D. & N. charged their usual fees on their company book for what they did for B. A part of the account accrued more than six years before the commencement of this suit, but was for services rendered in suits terminated within the six years. It was held that the plaintiff, as surviving partner, is entitled to recover; that the defendant should have performed his part of the contract before he was entitled to an application upon his debt, or a reduction of the account; that the employment of D. was a condition precedent to be performed by the defendant; that an attorney's employment in a suit is continuous; and that the statute of limitations does not begin to run on his account until the case is ended, or he is otherwise discharged. *Langdon v. Castleton*, 48 Vt. 52.

² *Foster v. Jack*, 4 Watts (Penn.), 234. But see *Lichty v. Hugus*, 55 Penn. St. 434; *Hale v. Ard*, 48 id. 22.

³ *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 id. 306.

⁴ *Elliot v. Lawton*, 7 Allen (Mass.), 274; *Walker v. Goodrich*, 16 Ill. 341; *Fenno v. English*, 22 Ark. 170. In *Mygatt v. Wilcox*, 1 Lans. (N.Y.) 55, affirmed, 45 N. Y. 306, the plaintiff, an attorney, rendered services and made disbursements for the defendants upon an accounting before the Surrogate of Chenango County, and upon the appeal from the Surrogate. The plaintiff was employed in 1852. In 1855 a decree was made in which a certain sum was allowed the defendants. In 1858 this decree was reversed by the Supreme Court, and the whole case was ordered to be reheard by the Surrogate. The case remained in this condition until 1866, when the parties settled all differences between them. In 1867 this action was brought, and the court held that the claim was not barred by the statute. "That the plaintiff was retained in this case," said BOARDMAN, J., "and acted before the Surrogate and on appeal, must be conceded. It is equally true that such business as he was engaged in before such Surrogate and on said appeal was not disposed of until 1866, when the same was finally settled by the action of the parties. Upon the conceded facts, I think the law would declare the plaintiff's retainer general in the matter, and continuing until the final settlement in 1866. Under such circumstances the statute would not run until 1866, and the plaintiff's action is well brought." *Whitehead v. Lord*, 7 Exch. 691; *Hall v. Wood*, 9 Gray (Mass.), 60.

curred afterwards.¹ In the case last cited the plaintiff, a proctor, sued the defendant for the amount of his bill, which was chiefly for work done in prosecuting an appeal to judgment. After the judgment, a communication had been made by the adverse party to the plaintiff as proctor, and attended to by him, respecting the costs, and an item in respect of this transaction was added to the plaintiff's bill. No previous part of the demand had accrued within six years. It was held that the latter item did not take the rest out of the statute of limitations. "When," said LORD TENTERDEN, C. J., "the suit was terminated by a sentence, there is no doubt that the proctor had a right to call for the amount of his bill. His duty was then concluded, unless something should occur to require his further interference. A letter is, indeed, sent to him in October (the judgment was given in July) on the subject of the costs, and a further charge arises for the perusal and consequent attendance; but this was mere accident."

It must be understood, however, that this rule relates to an attorney's bills under a general retainer, so that his services are continuous, and has no application where he is specially employed, as to make a brief, or argue a cause, or file a motion, or perform any other special service that does not involve or contemplate any further connection with the case. In the latter instance his right of action is complete as soon as the service is performed. The law fixes an attorney's responsibility to act for his client until the business is disposed of. But the rule is subject to the exception that his relation with the cause may be terminated by notice given by him to his client that he shall cease to act further in that capacity, or by a notice to him from his client that his services are no longer required, in which case his right of action accrues from the time his connection with the case ceases;² so also by the death of his client.³ Another matter must be remembered, and that is, that where there is no special agreement in relation thereto, if an attorney is employed in several causes, his right of action accrues with the entry of final judgment in each of them, and the statute begins to run from that time, and is not suspended by the circumstance that other actions for the same client in which he is employed are still pending;⁴ and this is also the case as to special services rendered by him not connected with

¹ *Rothery v. Munnings*, 1 B. & Ad. 15.

² *BOARDMAN*, J., in *Mygatt v. Wilcox*, 1 Lans. (N. Y.) 58; *Phelps v. Patterson*, 25 Ark. 185.

³ *Harris v. Osborn*, 2 C. & M. 629; *Whitehead v. Lord*, 7 Exch. 691; *Martindale v. Faulkner*, 2 C. B. 706. In *Harris v. Osborn*, 2 C. & M. 629, *LYNDHURST*, C. B., in passing upon this question, said: "I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it

on to its termination. I do not mean to say that under no circumstances can he put an end to this contract; but it cannot be put an end to without notice." This rule was recognized in *Nicholls v. Wilson*, 11 M. & W. 106, and still later in *Phillips v. Broadley*, 9 Q. B. 745, although in the latter case it was held to apply only to services and charges in the particular suit, and not to affect general charges.

⁴ *Adams v. Fort Plain Bank*, 36 N. Y. 255.

any suit, as for advice, drawing deeds, contracts, &c., — in such cases the right of action accrues at once, unless a special term of credit is agreed upon, and the statute begins to run from the time when they were rendered.¹ There are instances of special contracts with attorneys, where their fee is made contingent upon the collection of a demand; and in such cases, of course, the statute does not attach upon the entry of judgment, but only when the judgment is collected.² In such case his fee, being exigible until the money is collected, does not begin to run from the date of the judgment,³ but from the time when the money is collected; and, if the money is collected at different periods, perhaps the statute attaches to each sum collected, at the time of its collection. In Pennsylvania, it is held that the statute begins to run for professional services as soon as they are ended.⁴ The theory upon which these cases proceed is that the services are rendered upon an entire contract, so that a right of action does not accrue until the entry of final judgment;⁵ and if a special contract is shown to have existed as to compensation, and the time and mode thereof, of course that will control as to the time when the statute attaches.

SEC. 122. When Attorney is charged with Misfeasance or Malfeasance. — An action lies against an attorney for negligence in the collection of claims left with him for that purpose, from the time the client first had or ought to have had, by the exercise of proper diligence, knowledge of the fact;⁶ and he is treated as having notice of the fact after the lapse of a reasonable time, as it is the duty of a client, and the law presumes that he will do so, to look after his own interests;⁷ and the lapse of a reasonable time, without bringing suit therefor, fixes his liability, and the statute begins to run from that time.⁸ Of course, the

¹ Id. In *Hale v. Ard*, 48 Penn. St. 22, it was held that the statute runs against a claim for professional services as soon as they are finished, and the relation of continuing attorney in a litigated case will not prevent the claim for services generally from being barred by the statute, although it may for services rendered during the progress of that particular case, and in that case. In an English case, this rule was well illustrated where an attorney was employed to raise money on a mortgage, and by direction of his employer applied to several persons for that purpose, and communicated from time to time with the defendant. In a suit for services the statute of limitations was pleaded. LORD DENMAN, C. J., said: "As to the first point, it appeared by the plaintiff's bill that certain items relating to a transfer of a mortgage occurred more than six years ago, and other items relating to the same

matter were within six years; and it was contended that the whole must be taken to be done under one contract, and that there was no cause of action in respect to any until all were complete. There was no evidence except the bill itself, and the language of that leads to a different construction; therefore the items beyond the six years should be disallowed." *Phillips v. Bradley*, 11 Jur. 264.

² *Foster v. Jack*, 4 Watts (Penn.) 334.

³ *Morgan v. Brown*, 12 La. An. 159.

⁴ *Hale v. Ard*, 48 Penn. St. 22; *Lichty v. Hugs*, 55 id. 434.

⁵ *Hall v. Wood*, 9 Gray (Mass.), 60; *Eliot v. Lawton*, 7 Allen (Mass.), 274.

⁶ *Derrickson v. Cady*, 7 Penn. St. 27. In *White v. Reagan*, 32 Ark. 281, it is said to begin to run at once.

⁷ *Rhines v. Evans*, 66 Penn. St. 192; *Stephens v. Downey*, 53 id. 424.

⁸ *Mardis v. Shackelford*, 4 Ala. 493.

question as to what is a reasonable time, in this as well as in all other cases, is one of fact, to be determined in view of the circumstances of each case. This rule does not override the rule that must at all times be borne in mind in reference to torts, — that time runs, and a right of action accrues from the wrong-doing, and not from the time of damage;¹ because the attorney is entitled to a reasonable time in which to bring action, and a right of action does not accrue against him, nor is the wrong complete until the lapse of such period. Then the tort becomes complete. Where an attorney is sued for malpractice, the cause of action arises from the time when such malpractice occurred, and that without any reference to the circumstance whether the client then knew the fact or not.² Thus, where an attorney retained by the plaintiff in 1844 represented to him that certain proposed securities for an advance of £3,000 were sufficient, when in fact they were worthless, but the fact of their worthlessness was not discovered until some time in 1850, after more than six years had elapsed from the making of the security, it was held that the statute of limitations barred the claim, although interest upon the advance had in the mean time been duly paid. BAYLEY, J., in delivering the judgment of the court, said: "This is a case of no difficulty whatever. It appears to me that the misconduct of the defendant is the gist of the action. If the allegation of special damage had been wholly omitted, the plaintiff would have been entitled to nominal damages." The doctrine of this case was sustained by a later one involving a similar question.³

As to the question when a right of action accrues against an attorney for money collected by him for, and not paid over to, his client, some difficulty is experienced in view of the fact that an action cannot be brought until a demand is made upon him for the money. In Pennsylvania, it is held that, in the absence of fraud on the attorney's part in concealing the facts, the statute begins to run from the time of the receipt of the money without regard to the question whether the client had notice of the fact or not;⁴ and such also appears to be the rule in New York,⁵ Virginia,⁶ and South Carolina;⁷ and this rule was held in some of the cases cited, although a demand for the money was made within six years, the court holding that the rule as to demand was for the benefit of the attorney, and did not affect the ques-

¹ *Batty v. Faulkner*, 3 B. & Ald. 288.

² *Whitehead v. Howard*, 3 B. & Ald. 288. In *Crawford v. Goulden*, 33 Ga. 173, the court held that, in an action against an agent for negligence or unskilfulness, the statute begins to run from the time the negligent or unskilful act was committed, and that the circumstance that the plaintiff was ignorant of the fact cannot operate as a suspension of the statute.

³ *Smith v. Fox*, 6 Hare, 386.

⁴ *Campbell v. Boggs*, 48 Penn. St. 524; *Glenn v. Cuttle*, 2 Grant's Cas. (Penn.) 273; *Krause v. Dorrance*, 10 Penn. St. 462.

⁵ *Stafford v. Richardson*, 15 Wend. (N. Y.) 302.

⁶ *Kinhe v. McClure*, 1 Rand. (Va.) 284.

⁷ *Hounsell v. Gibbs*, 1 Bailey (S. C.), 48.

tion as to the actual accrual of the action. But in all these cases it will be observed that a long period of time had elapsed between the receipt of the money by the attorney and the bringing of the action for its recovery, and that the client had been guilty of laches in not making inquiry as to the state of the claim, and the attorney had been derelict in duty in not having apprised him of the fact that the money had been collected. Where the attorney notifies the client of the collection of the money, it has been held that the statute does not begin to run in his favor until after the lapse of a reasonable time from the receipt of such notice by the client in which to make demand;¹ but there does not seem to be any good reason for this rule, and we apprehend that, if the rule first stated is subject to any modification, it is much better expressed in a Pennsylvania case,² where it was held that the statute under such circumstances begins to run from the time when the client has notice of the fact.³ In Arkansas, it has been held that the statute begins to run, where no notice is given by the attorney of the collection, from the time when he ought to have given such notice;⁴ in other words, after the lapse of a reasonable time after the collection is made. In this case the court say that "where an attorney collects money on an account, and notifies his client thereof within a reasonable time, he will not be liable to an action for the money without special demand," but that the rule is otherwise where no notice is given.⁵ If an attorney has fraudulently concealed the fact, as if, upon being inquired of by his client, he informs him that the money has not been collected, the statute does not begin to run until the discovery of the fraud;⁶ but the fact that he neglects to notify the client of the collection, or that he appropriates the money to his own use, does not of itself amount to such fraudulent concealment.⁷ Where an attorney collects a claim in instal-

¹ *Lyle v. Murray*, 4 Sandf. (N. Y. Superior Ct.) 590.

² *McDowell v. Potter*, 8 Penn. St. 189.

³ Such, also, is the rule stated in *McCoon v. Galbraith*, 29 id. 293, as to partial collections upon a claim.

⁴ *Denton v. Embury*, 10 Ark. 228. In a later case in the same State this doctrine has been reiterated and reaffirmed. In that case the court held that an action cannot be maintained against an attorney or an agent for money collected by him as such until after demand and refusal to pay it over. "It is the duty," say the court, "of an agent or attorney, who has collected money as such, to give notice of the fact to his client or principal, within a reasonable time. Upon receiving such notice, the client or principal is bound to make demand within a reasonable time; and if he

omits to do so, the statute of limitations begins to run. If the attorney omits to notify his client, the latter may maintain a suit without previous demand. The statute will not commence to run until the client has notice by some means, unless the attorney can show that the client could, by ordinary diligence, have known of the collection." *Jett v. Hempstead*, 25 Ark. 462.

⁵ In *Hickok v. Hickok*, 13 Barb. (N. Y.) 632, it was held that the statute begins to run in favor of an attorney or other person who collects money for another, and neglects to pay it over, after the lapse of a reasonable time to do so, without a previous demand.

⁶ *Glenn v. Cuttle*, *ante*.

⁷ *Fleming v. Culbert*, 46 Penn. St. 498.

ments, the statute does not begin to run until the entire claim is collected, or until the matter is terminated by complete success or failure, unless he notifies the client of such collections, in which case the statute begins to run from the time of notice.¹ If an attorney fraudulently conceals the fact that a demand has been collected by him, the statute does not begin to run against his client until the discovery of the fraud by him;² and if he sends the claim to another State for collection, and upon being inquired of by his client informs him that it is not collectible, when in fact it has been collected, the statute does not run against his client until the discovery of the fraud, even though the answer was given by him in good faith.³

In a New York case,⁴ *E.*, the plaintiff's decedent, was the owner at the time of her death, which occurred in 1878, of a promissory note executed by *H.*, her husband, the defendant's intestate, which by its terms, fell due in May, 1873. *E.* left a will by which she bequeathed the note to certain persons named. *H.* proposed to the legatees that in case payment was not required, he would upon his death will all his property to them. The note was thereupon surrendered to him; he died intestate in 1883. The will of *E.* was thereafter probated and letters of administration, with the will annexed, issued to the plaintiff. On reference under the statute of a claim based upon the note, it was held, that if there was a valid agreement between *H.* and those to whom the note was bequeathed, then his estate was not liable upon the note, but only for a breach of the contract agreement, which cause of action belonged to the legatees, not to the plaintiff; if the agreement was invalid, then *H.* remained liable on the note simply, and the statute of limitations was a bar; that the defendant was not estopped by the agreement from setting up the bar of the statute, as the plaintiff represented none of the parties and was an entire stranger thereto.

¹ *McCoon v. Galbraith*, 29 Penn. St. 293.

² *Wickersham v. Lee*, 83 Penn. St. 416.

³ *Morgan v. Zener*, 83 Penn. St. 305.

⁴ *Myers v. Cronk*, 113 N. Y. 608.

CHAPTER XI.

AGENTS, FACTORS, &C.

SEC. 123. Agents, Factors, &c.

SEC. 123. **Agents, Factors, &c.** — Where goods are consigned to an agent for sale, on commission or otherwise, in the absence of any special contract relative thereto the law implies a contract on his part to account for such goods as are sold, pay over the proceeds to his principal, and return such as are unsold, on demand; and an action will not lie against him, as a general rule, and the statute does not consequently begin to run against the principal, until an account has been rendered or a demand has been made.¹ In a Pennsylvania case,² the plaintiffs furnished to the defendant, in 1856, an invoice of medicines to be sold on commission, and accounted for at prices fixed by a schedule. The defendant never rendered any account nor returned the goods, and in 1865 the plaintiff brought an action therefor, and the defendant set up the statute to defeat the claim. The court held that the statute did not apply, as it did not begin to run until an account had been rendered or a demand made upon the defendant by the plaintiff. The principle upon which these cases rest is, that, inasmuch as no time is agreed upon within which an account is to be rendered, or payment to be

¹ *Clark v. Moody*, 17 Mass. 144; *Topham v. Braddick*, 1 Taunt. 572; *Collins v. Benning*, 12 Mod. 444; *Baird v. Walker*, 12 Barb. (N. Y.) 298; *Holden v. Crafts*, 4 E. D. Sm. (N. Y. C. P.) 490; *Sawyer v. Lappan*, 14 N. H. 352; *Hutchins v. Gilman*, 9 id. 360; *Taylor v. Bates*, 5 Cow. (N. Y.) 379; *Paschall v. Hall*, 5 Jones (N. C.), Eq. 108; *Hays v. Stone*, 7 Hill (N. Y.), 128; *Krause v. Dorrance*, 10 Penn. St. 462. Where money is deposited with a person for a specific purpose as, to be invested in certain property or loaned upon interest, although no time is specified within which he shall account, he is only required to account on demand, and the statute does not begin to run against the principal until a demand has been made. *Joseph v. Baker*, 16 Cal. 173. A distinction of great importance exists

between such an agent and one who is merely intrusted with the collection of money, which arises out of the contract necessarily implied by law. In the former case, the only contract which can be implied is, that he will invest or loan the money judiciously, and account to the principal therefor on demand; while in the latter case the contract implied is, that he will collect the money and pay it over to his principal as collected. *Hart's Appeal*, 32 Conn. 520. And although in some instances, as in the case last cited, the rule may operate harshly, yet the fault is not with the law, but with the principal who leaves important interests to be controlled by an implied, instead of an express, contract.

² *Jayne v. Mickey*, 55 Penn. St. 260.

made, it will be presumed that such account was to be rendered and payment made upon demand by the principal, and that the agent stands to the principal in the relation of a trustee, rather than in that of a debtor, until by a demand upon him the principal has put an end to the trust. But this presumption does not arise where a special contract exists, providing the period or periods within which an account shall be rendered or payments made is fixed upon, and in that case a right of action, the statute will begin to run from such periods.

In the case of an open agency, it seems that a demand may be presumed after the lapse of a reasonable time. But in all cases of an open, continuing agency, a demand must either be proved or presumed.¹ The presumption is held in some of the States to arise so as to dispense with proof of a demand in the case of a collecting agent who fails to notify his principal, after the lapse of a reasonable time after the collection is made;² while in others, and by far the larger number, it is held that the cause of action arises from the time when a demand is made upon the agent, and not from the time when the money is received by him.³ In Connecticut, it is held that no demand is necessary

¹ HEATH, J.: *Topham v. Braddick*, 1 Taunt. 572; *Johnston v. Humphrey*, 14 S. & R. (Penn.) 394; *Judah v. Dyott*, 3 Blackf. (Ind.) 324; *Armstrong v. Smith*, 2 id. 251; *Holden v. Crafts*, 4 E. D. Sm. (N. Y.) 496; *Ferris v. Parris*, 10 Johns. (N. Y.) 285; *Sawyer v. Tappan*, 14 N. H. 352; *Buchanan v. Parker*, 5 Ired. (N. C.) L. 597; *Staples v. Staples*, 4 Me. 532; *Buchan v. James*, 1 Speers Eq. (S. C.) 375; *Satterlee v. Fraser*, 2 Sandf. (N. Y. Superior Ct.) 142; *Walradt v. Maynard*, 3 Barb. (N. Y.) 584; *McNair v. Kennon*, 3 Murph. (N. C.) 144; *Lever v. Lever*, 1 Hill (S. C.) Eq. 47; *Taylor v. Spears*, 8 Ark. 440. In *Stamford v. Tuttle*, 4 Vt. 82, and *Collard v. Tuttle*, id. 491, it was held that when a demand is necessary to perfect a right of action, and put the statute of limitations in motion, a demand would be presumed from the lapse of time, and such dealings between the parties as render it improbable that it should be neglected. See also *Raymond v. Simonson*, 4 Blackf. (Ind.) 77.

² *Drexel v. Raimond*, 23 Penn. St. 21. See also *Jett v. Hempstead*, 25 Ark. 462. The doctrine of this case is opposed to that of *McDowell v. Potter*, 8 id. 190, in which it was held that, "before an agent can be permitted to avail himself of the statute, he must prove that he has performed his duty. His omission to do so

amounts to such concealment of the state of the business, as in contemplation of law is such a fraud as deprives him of the protection of the statute." This case proceeds upon the ground that the principal may lie by and depend upon the integrity of his agent, without the exercise of any vigilance in that respect upon his own part, and that the failure of the agent to discharge his duty is *per se* a fraud. But this position is hardly sustainable, and to that extent the doctrine of the case has been overruled by *Rhine v. Evans*, 66 Penn. St. 192. See also *Campbell v. Boggs*, 48 id. 524.

³ *Merle v. Andrews*, 4 Tex. 200; *Gardner v. Peyton*, 5 Cranch (U. S. C. C.), 560; *Buchanan v. Parker*, 5 Ired. (N. C.) 507; *Judah v. Dyott*, 3 Blackf. (Ind.) 324; *Lever v. Lever*, 1 Hill (S. C.) Eq. 62; *Taylor v. Spears*, 8 Ark. 429; *Hyman v. Gray*, 4 Jones (N. C.) L. 155; *Topham v. Braddick*, 1 Taunt. 571; *Green v. Johnson*, 2 G. & J. (Md.) 389; *Dodds v. Vannay*, 61 Ind. 89; *Egerton v. Logan*, 81 N. C. 172. In *Green v. Williams*, 21 Kan. 64, it was held that, in the absence of any contract between the principal and his agent as to when or how the money collected by him is to be sent, the statute does not begin to run until after demand and refusal.

in the case of an ordinary collecting agent, and that the statute begins to run from the time when the money was received by the agent.¹ In this case the court put its decision upon the ground that money collected by an agent is recoverable at law, and only at law, by the ordinary legal remedies. In other words, that, in the ordinary relation of a principal and a collecting agent, the agent becomes a debtor for the money as soon as it is received, and that may properly be charged in account against him, and recovered by action of book account where that form of action exists, or in assumpsit at the election of the principal, and that the agent cannot properly be said to take or hold the money as a trustee under an express trust.² The difference of

¹ Hart's Appeal, 32 Conn. 520; Lawrence University v. Smith, 32 Wis. 587. In Reitz v. Reitz, 14 Hun (N. Y.), 536, the defendant in 1854 was intrusted by the mother of the plaintiff and defendant with certain money, and that with this he purchased certain real estate and took the title in his own name, and afterwards, with the consent of his mother, he erected buildings thereon and collected the rents. The mother died in 1866, leaving the plaintiff and defendant as her only children. The court held that the statute had run against all claim for the money in the defendant's hands before his mother died. "An agency," said BARNARD, P. J., "is not such a technical trust as to prevent the application of the statute of limitations." Renwick v. Renwick, 1 Bradf. (N. Y. Surr.) 234; Murray v. Coster, 20 Johns. (N. Y.) 576; Lillie v. Hoyt, 5 Hill (N. Y.), 396.

² In this case the circumstances were such as to induce the court to bend the rules as far as possible in favor of the plaintiff. The amount involved was over \$47,000, and the amount which was lost in consequence of the statute bar was nearly \$37,000, all of which was admitted to have been received by Mr. Bull, the agent, in his lifetime, in money, as the proceeds of the renting and sale of the plaintiff's real estate in Ohio, and there was no pretence or claim that it had ever been paid over to her. He was appointed her agent on the 30th of May, 1839, with a power of attorney authorizing him to take charge of all the property, sell or rent the same, renew contracts, receive the money for the rent or sales of the same, &c. In 1843, by the death of her mother,

the plaintiff became the owner of a large lot of other real estate in Ohio, and in 1851 she executed another power of attorney to the deceased, authorizing him to take charge of this property to the same extent that she could do herself. The property had for a long time prior to the appointment of the deceased as agent in 1839 been in the charge of agents in Ohio, and their agency was continued during the lifetime of Mr. Bull, so that all he had to do in the matter was to take general control of the matters, execute the conveyances, and receive the money forwarded by them to him. In 1841 he rendered an account to the plaintiff, and paid over to her all the money received by him up to that time. From the time of the settlement in 1841 down to the day of Mr. Bull's death in 1861, he received of the plaintiff's money \$137,328.79, and paid out for her during that period \$99,784.16, leaving a balance due her of \$37,535.15. The statute of limitations was set up against all of this claim except that which had accrued in the last six years preceding Mr. Bull's death, and the plea was sustained, and the plaintiff's recovery limited to \$11,976.47. "The question in this case," said HOSMER, J., "is, whether the statute of limitations applies to so much of the appellant's claim against the estate of Mr. Bull as was of more than six years' standing at the time of his death. Counsel for the appellant insist that it does not apply, and they cite in support of their claim that class of English and American cases in which it is held that the statute does not run in favor of trustees, stewards, and certain confidential agents, so long as the confidential relation exists. They also

opinion, whether a right of action exists against an agent until a demand has been made upon him, has arisen upon the question as

cite cases against persons having money in their hands under such circumstances that they are not bound to pay it over to the owners of it until after it has been demanded, in which case, as the money cannot be said to be legally due until after such demand, the statute, of course, does not begin to run until that time. We have not deemed it necessary to examine these cases particularly, as we are of opinion that they do not apply to the facts of this case. We prefer this course, because we are not at this time prepared to say that the rule against stewards and certain confidential agents as administered in England applies here to the full extent claimed by the appellant; and as we think none of the cases go so far as counsel ask us to go in this case, it appears to us the most proper course to leave the law upon this subject to be considered when the question arises under such circumstances as render it necessary to determine it.

"If the question in this case had arisen previous to the statute of 1855 (p. 69 of the acts of that year), giving to courts of equity 'concurrent jurisdiction with courts of law of all matters remediable by action of account, to be proceeded with in such courts of equity to final decree, according to the common course of proceedings in courts of equity,' it is very clear that the statute of limitations would have been a direct and positive bar to the prosecution of the claim. It is only by virtue of that statute that the appellant claims that a bill in equity is a concurrent remedy with an action of account, and might now be brought for her demand; and although an action of account as well as book debt and assumpsit is barred by the statute, yet the appellant insists that a bill in equity is not, and as she is now at liberty to prosecute her demand on the equity side of the court, she has a right to the decree of the court in her favor, although the claim is barred at law. The action of account, book debt, or assumpsit, or whichever of them would have lain for this demand, were and now are perfectly adequate remedies for the claim, and, except so far as the act of 1855 has altered

the law in respect to matters remediable by the action of account, where there is adequate remedy at law courts of equity have no jurisdiction. We have the case, then, in which previous to 1855 an action at law was the only remedy for the enforcement of the claim, and in which such an action may still be maintained, since by that act a bill in equity is only made a concurrent remedy with an action of account. Now, as we have seen, if an action at law had been brought, or the demand had rested as a mere demand at law to be prosecuted before commissioners on an insolvent estate, it is not and cannot be denied that the statute of limitations would apply to the claim, since the statute is made directly applicable to the actions of account, book debt, and assumpsit founded on such a claim as this, which are the only actions that could have been brought for it. Rev. Stat. tit. 31, § 8. But if such a claim was absolutely barred by the statute of limitations as it existed previous to 1855, and is still barred by the express language of the statute if an attempt should be made to enforce it by an action at law, can it be regarded as the intention of the act of 1855 to repeal the limitation in case a party under the authority of that act chose to prosecute his claim on the equity side of the court, while it confessedly would be barred if prosecuted at law? In *Robbins v. Harvey*, 5 Conn. 335, it was held that where assumpsit was brought for a claim which was the ordinary subject of book debt, the statute of limitations in regard to book debts applied to the case, on the ground that the statute was intended to apply not merely to the form of the action, but to the nature of the indebtedness; and it would seem but a fair application of that principle to hold that the statute creating a bar to an action of account is equally applicable to the account which is attempted to be enforced by a bill in equity, which is now made by statute a concurrent remedy with an action of account. Especially would this seem to be so in Connecticut, where we have been in the habit of treating the statutes of limitation with rather more favor

to what contract is to be implied on the agent's part, when he assumes the relation to his principal. Formerly, it was thought that

than has been the case elsewhere. Our statute in terms merely applies to an action brought for the recovery of a claim or debt of more than six years' standing, but this word 'action' has never been construed in any narrow and technical sense as applying only to a demand made by a plaintiff, but has been extended to a plea of set-off, on the ground that the spirit of the act embraces an outlawed claim which a party attempts to avail himself of by a set-off, as much as the same claim when the party attempts to enforce it by a direct suit; and it is only on the ground of its being within the object and spirit rather than within the letter of the statute that claims presented to commissioners on insolvent estates are held to be subject to the statute of limitations. 1 Swift's Dig. 807.

"We have never adopted the expedient which has prevailed to some extent in other States, of taking cases out of the statute upon some doubtful or equivocal acknowledgment, but have always held that the party must have intended to relinquish its protection, or that its provisions must be applied; and our courts have called it a beneficial statute, and have looked upon the lapse of time prescribed as a bar to the bringing of an action as furnishing a presumption of payment rather than as an arbitrary statutory bar to a valid claim. JUDGE HOSMER quotes with approbation the language of CHIEF JUSTICE PARSONS, in which he lays down the principle that the presumption from the lapse of time is that the defendant has lost the evidence which would have availed him in his defence if seasonably called on for payment; and JUDGE DAGGETT expresses his satisfaction in rejecting the grounds on which an attempt was made to evade it. *Lord v. Shaler*, 3 Conn. 131; *Marshall v. Doliber*, 5 id. 480; *Weed v. Bishop*, 7 id. 128; *Peck v. Botsford*, id. 172.

"But coming to the appellant's claim in this case, is it one to which the statute properly applies? Now, we do not understand that the counsel for the appellant deny that the items of the account are all

the proper subjects of charge on book, and might be recovered in an action of book debt. Indeed, we do not see how, consistently with their own claim upon the record, this could be denied. But it is said that the claim is pursued only as an equitable one, in the nature of a bill in equity for an account against a confidential agent; and that to such a claim the statute does not apply. The deceased is said to have been a trustee for the appellant, and his case is likened to that of the steward of an estate. But, in regard to the money unaccounted for, wherein was he a trustee or steward any more than any collecting agent who has the money of his principal in his hands may be said to be such? And it surely would not be claimed that the statute of limitations does not apply in favor of an ordinary agent who has his principal's money, and whose only duty in regard to it is to pay it over. The auditor's report shows that all the money received by Mr. Bull, which he has not accounted for and paid over to the appellant, consists of sums that were remitted to him by Miss Hart's agents in Ohio. And the only duty that devolved on him in regard to this money was to get the drafts cashed and pay over the avails to his principal. Can there be any doubt, supposing this to be all there is in the case, that on the receipt of any sum from one of the appellant's Ohio agents by the agent here, that sum immediately became a debt against the agent here, for which book debt or assumpsit might have been brought? Is not the duty of a collecting agent to seek his principal and pay over the money collected as obvious and clear as any duty he has to perform? An action will lie against a sheriff who collects money on execution without any previous demand. And in respect to the moneys collected of the Ohio agents, it would seem that Mr. Bull could stand upon no higher ground. *Dale v. Birch*, 3 Camp. 347; *Jefferies v. Sheppard*, 3 B. & Ald. 696. But if an action could have been brought for this money without a previous demand, then, as the rule must be reciprocal, the statute commenced running at the time

account was the only remedy against an agent, and later, that assumpsit could not be maintained unless there had been an express promise to account. "But," says PARKER, C. J., in a well-considered Massachusetts case,¹ "the doctrine now settled is, that the undertaking to act as bailiff is an undertaking to account; and LORD HOLT says,² whenever one acts as bailiff, he promises to render an account; 'although,' he adds, 'in Comyn on Contracts the inference from this

the money was received. *Lillie v. Hoyt*, 5 Hill (N. Y.), 395. It was suggested that there were taxes and other expenses to be paid out of these funds. This, however, does not appear, and the fact that the money was remitted to Mr. Bull by other agents of Miss Hart residing in Ohio, where the lands were situated, raises a strong presumption that only the net avails, after all charges of this sort had been deducted, were sent to him, so that his only duty must have been to pay over the sums as they were received. We do not see, therefore, how Mr. Bull's condition was anything other than that of an ordinary collecting agent; and if we are correct in this, there can be no doubt that the statute of limitations applies to the case.

"But we do not see how it was possible for the appellant to recover in this case before the auditor that portion of her claim which is of more than six years' standing, on another ground, whatever might have been the case before the commissioners. No doubt, on a trial before commissioners on an insolvent estate, it is open to a party to make out either an equitable or legal claim, and on his doing either he is entitled to an allowance of it, since in that tribunal there are no pleadings to embarrass a claimant, and the commissioners must have equitable as well as legal powers, or they could not do justice in all cases. But when a case comes by appeal from the commissioners to the superior court, although there are of course the same equitable and legal powers in the court, yet by the rules of practice which prevail in that court the claimant, where he is the appellant, must give the opposite party specific notice of his claim by filing what are called the reasons for his appeal. In this case the appellant might have stated her claim in such a manner as to entitle her to a recovery whether it was an equitable or strictly legal one. But she

obviously should be confined in her proof to the reasons she chose to give, since otherwise the rule requiring her to give reasons, instead of being of any benefit whatever to the appellees, would operate as a snare to mislead and entrap them. But the reasons in this case expressly state that the account presented to the commissioners, the disallowance of which is complained of, was due to the appellant by book; and she makes profert of her book in the precise form that has, time out of mind, been used in ordinary declarations in an action of book debt, and does not state her claim in any other form or as arising in any other way. How, then, could the auditor treat the claim in any other way than as a claim at law like any other book debt? And as the statute of limitations is made directly applicable to the action of book debt, and is held to apply to a debt by book in whatever form presented, it appears to us that there is no way of avoiding the application of the statute without wholly departing from the claim which the appellant has made upon the record. There was an attempt to avoid this result by claiming that the language of the second reason for the appeal was general enough to justify proof of any just claim, whether legal or equitable; but this, we think, is not so. Indeed, there is really but one reason given for the appeal. What is called the second reason sets up no new or different claim from the first. It expressly refers to the claim made in the first reason, and is a mere allegation that the commissioners rejected it when they should have allowed it.

"We are of opinion, therefore, that so much of the appellant's claim as was of more than six years' standing at the time of the death of Mr. Bull cannot be recovered against his estate."

¹ *Clark v. Moody*, 17 Mass. 145.

² In *Wilkin v. Wilkin*, 1 Salk. 9.

case is made to be, that the factor is liable only on demand, or on refusal to pay money,' yet, if the general principle adopted by Holt is right, that the mere acting as bailiff is promising to account, it would not seem that a demand is in all cases necessary to enable the principal to maintain his action. Indeed," he says, "such a limitation of the liability of a factor would be exceedingly inconvenient, and tend to the embarrassment of trade; for if a merchant who sends his goods to a foreign country to be sold can have no right to call for his money, the proceeds of his goods, until he has sent abroad to make a demand, the risk of loss from the failure of factors would be considerably increased, and the disposition to trust them proportionably impaired. Generally the consignor of goods accompanies his consignment with directions how to apply the proceeds: either to pay them over to a third person; or to remit in bills, or in merchandise, or in specie; or to hold them to answer his future orders: and in these cases there can be no difficulty. For the factor cannot be liable until he has actually or impliedly broken his orders. I say impliedly, for if the banker should become bankrupt or insolvent, with the goods of the principal or their proceeds in his hands, so that he is disabled from remitting them, or otherwise appropriating them according to the instructions of the principal, there seems to be no reason why an action would not immediately lie against him; by analogy to the common-law principle, that when a duty is to arise upon a demand, and the party liable has disabled himself from performing, the necessity of a demand ceases. And if this were not so, creditors here, who could not for a long time cause a demand to be made, would have no opportunity of securing themselves out of the effects of the factor in this country; while creditors of a different description, but not more meritorious, would meet with no impediment in securing their debts.

"The practice here has conformed to this principle; for many instances are known to have occurred, of actions brought and sustained against factors in foreign countries, although no demand had been previously made upon them to render an account. And it is probably upon this ground, if at all, that a principal may prove his claim against his factor, under a commission of bankruptcy in England, although no demand had been made upon him; so that the debt was contingent according to the general liability of factors.¹ It is also the duty of factors to account to their principals in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient, so that a factor abroad, who should receive goods to sell, without

¹ In *Green v. Williams*, 21 Kan. 64, it was held that in the absence of any agreement between a principal and his agent residing in another State, as to when or how money collected by him shall be sent to the principal, the statute does not begin to run in favor of the agent until a demand has been made upon him for the money, or at all events until directions have been given him as to how it shall be sent.

special directions as to the mode of remittance, would be held, according to the course of business, to give his principal information of his progress in the transaction; and if he should neglect unreasonably to forward his account to his employer, this negligence would be a breach of his contract, and subject him to an action. So, if he should render an untrue account, even without any intention of fraud, claiming greater credit than he was entitled to, so that the balance shown was not true, we conceive the principal would have a right of action, without a demand. For he would not be obliged to submit to such charges as the factor should choose to make, or to wait, perhaps at the risk of his debt, until his agent should voluntarily correct his account, and acknowledge a just balance. But if the factor should receive and sell the goods, without any special orders as to remittance, upon an understanding, express or implied, that he is to hold the proceeds to the order of his principal; and he does nothing in violation of those orders, or to disable himself from complying with them when they shall be received; and transmits a true account of sales, in a reasonable time, according to the course of business, and is ready to remit or answer drafts upon him, — we think that no action will lie against him for the balance in his hands, for his contract is to sell and render an account, and he ought not to be held to remit at his own risk; and he cannot remit at the risk of his principal, unless in compliance with instructions. It was urged in argument, that, as the defendants had stated an account and acknowledged a balance, they were indebted for that balance, and that a right of action immediately accrued without demand, as in other cases of admitted debt. It may be so, where there is nothing in the case to control the legal presumption. But if the course of business between the parties, or any evidence accompanying the account, shows a contrary implication, the presumption would fail.

“In the case before us, the referees state that, when the account was sent on, which acknowledges the balance, it was accompanied by a letter from the defendants, in which they state that they hold the balance for the order of the plaintiff. This declaration is repeated in the following month; and it appears by the account stated by the referees that all the proceeds, except the balance acknowledged, had been paid by drafts from the plaintiff. These facts, with nothing of a contrary complexion, go far to show that the consignments were accepted with an understanding that the proceeds were not to be remitted without orders from the consignor.

“The case in this view seems to be at least as strong as that cited from 10 Johns.,¹ in which it was decided that the consignee was not liable in the action, because he had committed no breach of trust or duty. It appeared in that case to be the usage for the consignor to direct the mode of remittance; and it probably is the general practice

¹ *Ferris v. Parris*, 10 Johns. (N. Y.) 285.

everywhere. Such practice, together with the conduct of the defendants in the case before us, may justify the conclusion that this consignment was made and accepted conformably to this practice. But this is a fact to be stated by the referees, and not by the court. If they determine, from the evidence in the case, that the understanding of the parties was, that the consignor was to direct the remittance, to draw for the proceeds, or otherwise appropriate them, then the defendants were not liable to the suit; and of course not to the costs, unless they were negligent in transmitting their account, or upon another ground they rendered themselves liable.¹

“It has been stated, as one of the grounds of the liability of a factor, that he should have transmitted a false account, or one misrepresenting the balance in his hands. In the account transmitted by the defendants, the balance stated is little more than half the amount found by the referees to be due. *Prima facie*, this shows a wrong statement of account, by which the plaintiff was not bound to abide. If he had drawn for a larger sum, his bill might have been protested; if he had drawn for the balance as stated, it might have been an admission that the balance was true. He had, therefore, a right to sue, if it should turn out that there was a misstatement of the account. On the other hand, if it shall appear that the account was correct, and that the referees have increased the balance against the defendants improperly, or from considerations of supposed equity, contrary to their legal rights, the eventual balance found would not affect their liability when the suit was brought.”

From the cases cited in this and the previous section it may be said that the tendency of the courts is, to hold that, in the case of an ordinary collecting agent, whose only duty is to receive and pay over the money to his principal, the statute begins to run immediately upon the receipt of the money, regardless of the question whether a demand has been made or not, unless he has fraudulently concealed the fact of its receipt by him,² or in any event after the lapse of a reasonable time

¹ When there is an understanding between the parties that the agent is to account or pay on demand, the agreement takes the place of any implied contract, and controls. Thus, where money is deposited with an agent to be loaned or invested with interest and be accounted for on demand; whether the loans be made or not, or whether the money is used by the agent or not, or although the money is used by him which would amount to a loan to him, the statute does not begin to run in his favor until after a demand for an accounting is made upon him. *Baker v. Joseph*, 16 Cal. 173.

² *Campbell v. Boggs*, 48 Penn. St. 524; *Emmons v. Hayward*, 6 Cush. (Mass.) 501; *East India Co. v. Paul*, 1 Eng. L. & Eq. 44; *Estes v. Stokes*, 2 Rich. (S. C.) 320; *Hopkins v. Hopkins*, 4 Strobb. (S. C.) Eq. 207; *Cogwin v. Ball*, 2 Ill. App. 70. In *Dodd v. Vannay*, 61 Ind. 89, it was held that a creditor who takes a note from his debtor to be collected and applied to the payment of his debt, and the balance to be paid to the debtor, is the debtor's agent, and not liable for the balance until demand has been made therefor. The statute begins to run against the claim of a principal to recover from an agent who has collected a

after he has received it, in which to notify his principal.¹ Where the agent has properly notified his principal of the collection,² or where he has rendered him an account of his transactions, the statute runs from the receipt of such notice or account by the principal.³ And in the case of factor's other agencies, involving a more complicated condition, the question as to whether a demand is essential to complete the liability of the agent will depend upon the nature and character of the business, and the contract that is fairly implied therefrom, in view of all the circumstances.⁴ There is apparently no good reason why a principal, in the case of ordinary agencies, should be protected against his own laches any more than any other creditor; and such cases seem clearly to be within the very mischiefs that the statute designed to correct, and, except in those cases where the agent stands in the position of a trustee

note for him, from the time when the note was collected. *Lawrence University v. Smith*, 32 Wis. 587.

¹ In *Mitchell v. McLemore*, 9 Tex. 151, it appeared that in November, 1839, the defendant agent acknowledged the receipt from the plaintiff of a sum of money to be invested in paying government fees for Texas scrip, placed in his hands for location. This he failed to do, and in 1850 the plaintiff brought an action to recover back the money. The court held that it was the duty of the agent to perform what he had undertaken to do, within a reasonable time, and that when he violated his duty by allowing that time to pass without performing it, he rendered himself liable to an action, and from that time the statute of limitations began to run, and that in this case it had begun to run and become a bar to the action before it was brought. See also, to the same effect, *Denton v. Embury*, 10 Ark. 228; *Jett v. Hempstead*, 25 id. 462. This rule was also adopted in *Hickok v. Hickok*, 18 Barb. (N. Y.) 632; *McDonnell v. Bank of Montgomery*, 20 Ala. 313.

² *Lyle v. Murray*, 4 Sandf. (N. Y.) 590; *McCoon v. Galbraith*, 29 Penn. St. 293; *Davies v. Crum*, 4 Sandf. (N. Y.) 355.

³ *McCoon v. Galbraith*, *ante*.

⁴ *Clark v. Moody*, *ante*. This rule furnishes the key to the many apparently conflicting decisions upon the question as to when the statute attaches against the principal. Thus, where an agent is authorized to collect money for his principal, and nothing is said as to when he shall pay it over, what contract does the law fairly

raise from the relation? In determining this question, the circumstances of the case and the situation of the parties, the nature of the transaction and the probable duration of the relation, are all to be looked to. If the parties are in the same town or city, or so situated as to be frequently together, the presumption would naturally be that the parties intended that when the money was collected the agent should pay it over to the principal, or at the least notify him of the fact of collection, so as to give him an opportunity to call for it in person, or direct how it should be paid. If the parties are distant from each other, the presumption would very properly be that the agent was expected to notify the principal, and await his directions as to the disposition to be made of the funds, because it could not have been contemplated that the agent should pay the money in person, or that the principal should call upon him, in person, for it. Therefore, in such a case the presumption would be that the parties intended that the agent should notify him when the money was collected, so as to give the principal an opportunity to direct how it should be disposed of; and in the latter case the statute would begin to run from the receipt of the notice, *Lyle v. Murray*, *ante*; *Jett v. Hempstead*, *ante*; while in the former case it would run from the receipt of the money by the agent, *Glenn v. Cuttle*, *ante*; as the principal is charged with some diligence in looking after his own business, *Hart's Appeal*, 32 Conn. 520; *Clark v. Moody*, *ante*.

under an express trust, or has been guilty of actual fraud in concealing his liability to his principal, there is no good reason why the statute should not commence to run in his favor after the lapse of a reasonable period in which to give notice to his principal.¹ If a person intrusts important interests to the care of another, leaving the whole matter resting in parol, there is no reason why a judicial exception should be made in his favor to take his interests out of the operation of the statute, when, by the exercise of proper business discretion or of reasonable diligence on his part, his interests would have been properly protected; nor, where the agent has unreasonably delayed notice to his principal of the fact of collection, can he claim the benefit of the rule that a demand shall be made before action brought.² Where goods are left with a

¹ *Glenn v. Cuttle*, 2 Grant's Cas. (Penn.) 273; *Fleming v. Culbert*, 46 Penn. St. 498.

² *Estes v. Stokes*, 2 Rich. (S. C.) 320. In the case of a general agency, where the business runs through a considerable period, the statute of limitations does not begin to run until the expiration of the agency, especially where there is a current account. But if the transactions are isolated, the statute attaches to each in the order of their event. *Hopkins v. Hopkins*, 4 Strobb. (S. C.) Eq. 207; *Parris v. Cobb*, 5 Rich. (S. C.) 133. In a North Carolina case, one member of a firm was appointed agent for the others, to collect the debts due the firm and account for them as fast as received, or whenever required by the other partners. He entered upon the discharge of these duties in August, 1774. In April, 1777, he made a payment to the other partners of a part of their respective shares, who, being British subjects, were shortly after obliged to leave the State. In 1800, twenty-three years later, a bill for an accounting was brought against the representatives of the acting partner (then deceased), and it was held that the statute had not run upon the claim, because no demand for an accounting had been made. "The moneys," said TAYLOR, J., "were received by him in the character of a trustee, liable to pay what he should receive when his copartners should require it, and it was only when they did require, and he realized it, that this fiduciary character was put an end to." *McNair v. Kennon*, 3 Murph. (N. C.) 139. In *Sims v. Bruton*, 3 Exch. 802, it appeared that in March, 1832, the defendants, B. and C., who were then in partnership as solicitors,

were employed by A. to lay out £500 on mortgage. They lent the money to L. on the mortgage of certain premises, and retained possession of the mortgage deed. The premises were afterwards sold subject to the mortgage, and the purchaser paid C. the £500 and interest, but without the knowledge of B., and the deed was given up to the purchaser by C., but no receipt was indorsed thereon, nor was any reconveyance or receipt executed or signed by A., who was not informed that the money had been paid. In December, 1832, C., without the knowledge of B., returned to the purchaser £300, and received back the mortgage deed, and no part of the £500 was paid to A. Interest, at first on the £500, and then upon the £300, was paid to C. by the purchaser; and entries were made in the books of the defendants, giving credit to A. for interest on the £500, and debiting him with interest paid to his agent. In July, 1838, the defendants dissolved partnership. Up to the dissolution, interest on the £500 was regularly paid to the agent of A. by C., by checks drawn by the defendants on their bankers; and, after the dissolution, it was paid by C., sometimes in cash and sometimes by checks on his own banker. In some of the receipts the money was described as interest upon a mortgage. A. died in May, 1840. In December, 1846, the purchaser paid to C. the £300 and interest, and received from him the mortgage deed. B. was ignorant of the receipts and payments subsequent to the investment of the £500, until 1849. In 1848, the plaintiffs, the executors of A., first discovered that the mortgage money had been repaid. It was held that, under

person to be sold on commission, and when sold to be accounted for to the principal, in the absence of any express contract the law will from the facts imply one on his part to account to his principal on demand, and in such a case the statute would not run in his favor until a demand has been made,¹ or until the lapse of such a period that the law will presume that a demand has been made.² But, as previously stated, it must not be forgotten that the weight of authority sustains the rule that a right of action does not accrue until after a demand.³ Where a person claims to act as the agent of another, without any authority whatever, or where he is in fact an agent but acts in excess of either his real or apparent authority, a person who has dealt with him on the credit of his supposed principal may bring an action against the agent at any time within six years from the time when he has notice of the fact that the acts were unauthorized.⁴ On the other hand, where an agent becomes personally liable for a debt which he had authority to create, and which the principal should pay, the statute does not com-

the above circumstances, the statute of limitations was a bar to the action; also, that no action would lie against B., inasmuch as the subsequent receipt of the mortgage money by C. was wholly unauthorized, and not within the scope of the partnership business.

¹ *Holden v. Crafts, ante*; *Baird v. Walker*, 12 Barb. (N. Y.) 298; *Judah v. Dyatt*, 3 Blackf. (Ind.) 324; *Clark v. Moody, ante*.

² *HEATH, J., in Topham v. Braddick, ante*.

³ See note 1, p. 339.

In *Middleton v. Twombly*, 125 N. Y. 520, it was held that the rule that an action at law cannot be maintained by partners representing partnership transactions, does not apply to actions upon express or implied promises in relation to special transactions, or where a balance has been declared, or where the transaction does not involve an accounting as to partnership transactions.

When, from the usual course of business, or pursuant to special contract and instructions, a foreign factor has been in the habit of remitting the proceeds of consignments received by him without demand from the consignor, it is his duty to remit the proceeds of future consignments without waiting for demand, and a cause of action against him accrues upon the receipt of such proceeds, and his failure to remit. In this case in an action

for money had and received, it appeared that the plaintiff, a merchant doing business and residing in China, consigned goods to F., the defendant's testator, a commission merchant in New York City, under an agreement that F. should sell said goods, and pay from the proceeds their cost, with all expenses of freight, insurance, &c., and share equally with the plaintiff the net profits and losses; certain other goods were consigned to him for sale on commission. Prior to January, 1865, F. had sold all the goods consigned, collected the proceeds, rendered statements, and remitted to the plaintiff his share of the proceeds. In his accounts F. charged the premiums paid by him for insurance on the goods. The insurance companies in which he had insured subsequently declared dividends in favor of their policy holders for business done prior to 1865, and paid over to F. the dividends on such insurance paid by him, the last payment being made in 1867, he never reported or paid over to plaintiff any part thereof; plaintiff had no knowledge of these facts until 1888, when this action was brought. It was held that plaintiff's portion of said dividends became due and payable upon their receipt by F., and no demand was necessary to set the statute of limitations in motion, and therefore, that the action was barred by the statute.

⁴ *Flack v. Haynie*, 18 Tex. 408.

mence to run against his claim for indemnity until he had paid the debt ;¹ and where he has sold property for his principal which proves worthless, whereby he is subjected to loss, the statute does not begin to run until he is subjected to such loss ;² that is, until he has been compelled to respond in damages in consequence of the defects in the goods sold.

¹ *Gilmore v. Bussey*, 12 Me. 418.

² *Legare v. Fraser*, 3 Strobb. (S. C.) 377.

CHAPTER XII.

BILLS, NOTES, CHECKS, &c.

- SEC. 124. When payable on Demand.
 125. Notes or Bills payable "after Demand," "after Sight," &c.
 126. Notes and Bills payable by Instalments.
 127. Coupons, Interest Warrants, &c.
 128. Notes payable in Specific Articles.
 129. Notes subject to Assessment.
 130. Bill of Exchange payable at Particular Place.
 131. Bills accepted after Maturity.

- SEC. 132. Bills and Notes subject to Grace.
 133. Notes payable upon the happening of a Contingency.
 134. Indorser of Notes or Bills.
 135. Acceptor of Bill.
 136. Drawer of Bill.
 137. Suspension of Statute by Agreement of the Parties.
 138. Goods sold on Credit to be paid in Note within Certain Time.
 139. Witnessed Notes.
 140. Checks.

SEC. 124. **When payable on Demand.** — As has already been stated, the statute of limitations begins to run upon a bill or note payable at a fixed date, upon its maturity, which is the day succeeding that upon which it becomes due, as the payor has the whole of the day upon which it becomes due in which to pay it.¹ Notes payable "on demand" become due and payable from their date, in the absence of any

¹ *Ferris v. Williams*, 1 Cranch (U. S. C. C.), 475; *Short v. McCarthy*, 3 B. & Ald. 631; *Wittersheim v. Carlisle*, 1 H. Bl. 631. And this is so, even though the action would then be fruitless. *Emery v. Day*, 1 C. M. & R. 245. In *Raeffe v. Moore*, 58 Ga. 94, it was held that a note payable one day after date became due on the next day, but could not be sued until the next day, even though the note was antedated, and that a suit brought on the day it became due would be premature. A note payable one day after date, dated Dec. 14, 1850, was sued Dec. 16, 1854, and it was held barred by the statute. *Smith v. Wilson*, 15 Tex. 132. But on such a note an action commenced Dec. 14, 1854, would have been in season. *Cornell v. Moulton*, 3 Den. (N. Y.) 12. On such a note the statute begins to run on the succeeding day. *Davis v. Eppinger*, 18 Cal. 378.

Engel v. Fischer, 102 N. Y. 400.

The defendant, at Vienna, Austria,

where he resided, accepted a bill of exchange, dated May 1, 1873, payable three months from date. Soon after he absconded, coming to New York in July of that year, where he concealed himself from his creditors. The plaintiff discovered him in 1882, demanded payment of his bill, and, upon his refusal, brought suit upon the acceptance. It was held that the action was barred by the statute of limitations; that the case was not within any of the statutory exceptions.

The plain language of the statute may not be perverted to remedy the hardship or injustice of any particular case.

Sleight v. Kane, 1 Johns. Cas. (N. Y.) 76; *Poillon v. Lawrence*, 77 N. Y. 207, and the cases determining, where the debtor has been absent from the State, as to what is a return or coming into the State, so as to set the statute running, distinguished.

statute to the contrary, and consequently the statute begins to run thereon from their date,¹ if delivered on that day; but if it is not delivered on the day of its date, the statute begins to run from the date of its delivery, and not from its date, because until delivered it does not become operative, and no right of action exists until that time.² And the same is also true as to notes payable "at sight,"³ "when demanded," or "when called for,"⁴ or "in such instalments or at such times as C. may require,"⁵ or "when wanted,"⁶ or indeed any note in

¹ Wilks v. Robinson, 3 Rich. (S. C.) 182; Easton v. M'Allister, 1 Mo. 662; Taylor v. Witman, 3 Grant's Cas. (Penn.) 138; Larason v. Lambert, 12 N. J. L. 247; Hill v. Henry, 17 Ohio, 9; Hirst v. Brooks, 50 Barb. (N. Y.) 354; Newman v. Kettell, 18 Pick. (Mass.) 418; Wenman v. Mohawk Ins. Co., 18 Wend. (N. Y.) 267; Fells Point Savings Institution v. Weedon, 18 Md. 320; White's Bank v. Ward, 35 Barb. (N. Y.) 637. Mills v. Davis, 113 N. Y. 243. And the fact that the statute provides that any negotiable note, which remains unpaid four months, shall be overdue, does not change the rule, and the statute begins to run from the date of the note. Trustees, &c. v. Smith, 52 Conn. 434. In McMullen v. Rafferty, 89 N. Y. 456, one H. executed and delivered to plaintiff a non-negotiable note, made payable on demand, upon the back of which defendant had written his name. In an action thereon, it was held that the defendant did not, in a commercial sense, become an indorser, but could be treated by the plaintiff either as maker or guarantor; and in either capacity the cause of action accrued against him immediately upon the execution of the note and without demand; that the statute of limitations then began to run in his favor, and as the action was commenced more than six years after date of note, it was barred by said statute. It was also held, that payments of interest by H., although with the knowledge of the defendant, did not prevent the running of the statute; to have that effect they must have been made by him, or for him, by his authorized agent. In Thrall v. Mead, 40 Vt. 540, in an action on a note payable on demand, it was held that six years was a reasonable time in which to make demand, and that the statute runs from that time. Upon the general proposition stated in the text see Caldwell v. Rodman, 5

Jones (N. C.) L. 139; Presbrey v. Williams, 15 Mass. 193; Easton v. Long, 1 Mo. 662; Little v. Blunt, 9 Pick. (Mass.) 488; Codman v. Rogers, 10 id. 112. The words "on demand," "at sight," &c., are held not to constitute a condition precedent, but rather to import that the debt is due immediately. Byles on Bills, 342. And unless accompanied by some writing restraining or postponing the right of action, the statute begins to run thereon from its date. Christie v. Fosdick, Sel. N. P. 351; Megginson v. Harper, 2 C. & M. 322; Garden v. Bruce, L. R. 3 Exch. 300. In Lee v. Cassin, 2 Cranch (U. S. C. C.), 112, a note payable on demand was held not payable until demand made; but this case stands alone, although the doctrine is warranted by a fair construction of the contract, and not by authority. Ruff v. Bull, 7 H. & J. (Md.) 14; Peaslee v. Brettd, 10 N. H. 489. The same rule prevails in Scotland. Stephenson v. Stephenson, 11 F. C. Sc. 639; De Lavalette v. Wendt, 75 N. Y. 579; Wheeler v. Warner, 47 id. 519.

² Craft v. Thomas, 123 Ind. 513; O'Neil v. Maghee, 81 Cal. 631; Jones v. Nicoll, 82 Cal. 83.

³ Copp v. Lancaster, Cro. Eliz. 548; McIntosh v. Haydon, Ry. & M. 363; Rumball v. Bull, 10 Mod. 38; Collins v. Banning, 12 id. 444.

⁴ Bowman v. McChesney, 22 Gratt. (Va.) 609; Kingsbury v. Butler, 4 Vt. 458.

⁵ White v. Smith, 77 Ill. 351. But see Creighton v. Rosseau, 1 Iowa, 133, where a note made payable "at any time within two years" was held not to become payable until two years from its date, unless the holder exercised his option to make it become payable at an earlier date by demanding payment, in which case it became due, and the statute began to run from the date of demand.

⁶ Dorrance v. Morrison, MS. Case,

which no time for payment is expressed.¹ Thus, in an Iowa case,² a bill of exchange, in which no time for payment was fixed, was held to be payable on demand, and therefore not entitled to grace under the statutes of that State. But a note may be so drawn as to be payable at the option of the payee, either at once or on the happening of a contingency. Thus, in a Tennessee case,³ an action was brought upon a note dated Jan. 1, 1865, payable in gold or silver. The note contained a statement, as follows: "This promise to pay is on condition that the banks of Tennessee have resumed specie payment at that time; if not, as soon thereafter as they do resume specie payment; and the court held that the payee could waive payment in gold or silver and recover currency, without waiting for the banks to resume, and that the question as to when the statute of limitations began to run on the note would depend upon the circumstance whether the holder of the note had waived payment in specie. The fact that a note is payable "on demand with interest after four months" does not change the rule, or raise a presumption that it was only to become payable after a demand in fact.⁴ A note or bill indorsed or accepted after it is due, is, as against the acceptor or indorser, a note or bill payable on demand.⁵ A bill of exchange is subject to the same rules in this respect as a note, and a bill payable "on presentation," or "on demand at sight," is treated as though payable "at sight,"⁶ and therefore the statute runs upon it from its date.

In case property is sold, or money loaned, to be retained without interest until called for or demanded, and no note is given therefor, the statute does not begin to run until demand is made, as the rules of commercial law are not applicable in such cases:⁷ and the implied contract raised, and which controls, is, that the debt is not due or payable until demand or something equivalent thereto is made. Where a note is given payable on demand, but at the same time an agreement is executed which is to be taken in connection with it, and by the terms

District Court, Philadelphia, June 17, 1848.

¹ *Aldaus v. Cornwall*, L. R. 3 Q. B. 573; *Holmes v. West*, 17 Cal. 623; *Whitlock v. Underwood*, 2 B. & C. 157. In *Tucker v. Tucker*, 119 Mass. 79, the note in suit was lost. It was alleged that on July 1, 1869, the defendant gave the plaintiff his note for \$1,000, payable on demand. The evidence was that at the date named the plaintiff lent the defendant \$1,000, and at the same time received from him a note for that sum, which had been lost, and could not be produced. There was no evidence as to when the note became payable, but the court held that it might be presumed that it was payable on demand,

in the absence of any proof upon that point. In *Young v. Weston*, 39 Me. 492, a note given, payable "at any time within six years from this date," was held to be a note payable on demand, and that the statute attached to it from its date.

² *Davenport Bank v. Price*, 52 Iowa, 570.

³ *Walters v. McBee*, 1 Lea (Tenn.), 364.

⁴ *Loring v. Gurney*, 5 Pick. (Mass.) 15; *First National Bank v. Price*, 52 Iowa, 570.

⁵ *Rodgers v. Rosser*, 57 Ga. 819; *Patterson v. Todd*, 18 Penn. St. 426.

⁶ *Dixon v. Nutall*, 1 C. M. & R. 807.

⁷ *Sweet v. Irish*, 36 Barb. (N. Y.) 467.

of which the note is only to become payable in a certain contingency, the right of action does not accrue nor the statute begin to run thereon until such contingency accrues. Thus, in an English case,¹ C. being, about to open an account with a banking company, gave them a promissory note, dated the 4th of December, 1855, whereby he and S., the defendant, jointly and severally promised to pay to the company, on demand, £200. At the same time they signed and delivered to the company a memorandum stating that the note was given as a collateral security for the banking account intended to be kept by C., and that the company should be at liberty at any time thereafter to recover from them, or each of them, up to the full amount thereof, every sum which C. should at any time thereafter become indebted or liable to the company, for any moneys paid, lent, or advanced by them to or for him; and in case of the company suing on the note, its production should be conclusive evidence of the amount claimed by them from C. being due and owing by him. The banking account was accordingly opened with C., and on the 31st December, 1855, he was indebted to the company in £173. No demand of payment was made, or balance struck, until the 30th June, 1856, when £194 was due from C. to the company. A balance was afterwards struck every half-year, the company from time to time making advances, and C. paying money into the bank with which his account was credited. The sums so credited exceeded the amount of the note. The account continued until February, 1861, when it was closed with a balance due to the company of £175. In March, 1862, the company commenced an action against the defendant on the note. It was held that the cause of action was not barred by the statute of limitations. Upon this point POLLOCK, B. C., said: "After much consideration we have arrived at the conclusion that the statute of limitations is not an answer. Had the security been in the form of a bond for £200 and a defeasance to the effect of the memorandum, the operation and effect of the security would have been clear; and notwithstanding that the instrument is a promissory note payable on demand, which *prima facie* indicates present existing liability enforceable without demand, and as to which the statute of limitations runs from the date, we think we are bound to read it and the memorandum together in order to ascertain the true meaning and character of the transaction. It is clear that, until an advance was made by the banking company to Courtney, no action could have been maintained upon the note. Until then there would have been no consideration, and until there was consideration no action would be maintainable, and the statute of limitations only runs from the time when the cause of action accrued. The question, therefore, is, when did the cause of action accrue? And unless it accrued before the 2d March, 1856, the statute is no bar. It was contended before us that the statute began to run from the 31st December, 1855, by reason of the

¹ Hartland v. Jukes, 1 H. & C. 667.

debt of £173 1s. 11d., then due from Courtney, the customer, to the bank; but no balance was then struck, and certainly no claim was made by the bank upon the defendant's testator in respect of that debt; and we think that the mere existence of the debt, unaccompanied by any claim by the bank, would not have the effect of making the statute run from that date."

A similar rule was adopted in a Missouri case,¹ in which it was held that where delay in making demand is contemplated by the express terms of an obligation payable on demand, there is no rule of law which requires that the demand be made within the statutory period for bringing an action. Thus, where an obligation for the payment of money one day after date contained a condition that if the payee should demand payment during her natural life, it should be due and payable; but in case of her death before any or all of the debt should be paid, it should not be paid at all. A demand made by the payee more than ten years after the date of the paper was in time, and that an action brought immediately thereafter was not barred by limitation.

SEC. 125. **Notes or Bills payable "after Demand," "after Sight," &c.** — As we have already seen,² a note or bill made payable "after demand," "after sight," is not payable until demand is made for payment. If a note or bill is made payable twelve months after demand, the statute does not begin to run until the expiration of that period after demand, as the debt does not mature or become enforceable until that time;³ and the same rule prevails as to notes, &c., payable "after notice."⁴ Notes or bills payable "after sight,"⁵ or "on sight," are not due until presented for payment;⁶ consequently, if presented for payment for the first time within six years before action brought, the statute does not bar them, although more than the statutory period has elapsed before presentment. In Michigan and Pennsylvania the courts of law, following the rule in equity as to laches, held that, unless the statute is put in motion by a demand, within the period requisite to bar the action if it matured at its date, the right to make the demand, and consequently the right of action itself, will be barred. In Ohio⁷ it is held — and this seems to be a consistent rule — that in all cases where a demand is necessary as a prerequisite to an action, and no demand in fact is shown, it will, in the absence of special circumstances, be presumed to have been made at the expiration of the period within which the statute would have run

¹ *Jameson v. Jameson*, 72 Mo. 218.

² *Ante*, p. 317.

³ *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Wright v. Hamilton*, 2 Bailey (S. C.), 51; *Teroop v. Combe*, 8 D. & R. 374; *Taylor v. Whitman*, 3 Grant's Cas. (Penn.) 138; *Cadman v. Rogers*, 10 Pick. (Mass.) 120; *Richman v. Richman*, 8 N. J. L. 114; *Holmes v. Kerrison*, 2 Taunt. 323; *Wolfe v. White-*

man, 4 Harr. (Del.) 246; *Little v. Blend*, 9 Pick. (Mass.) 488. A note payable "on sight" is not payable, and the statute does not commence to run thereon, until after demand. *Wolfe v. Whiteman*, 4 Harr. (Del.) 246.

⁴ *Clayton v. Gosling*, 5 B. & C. 360.

⁵ *Holmes v. Kerrison*, 2 Taunt. 323.

⁶ *Wolfe v. Whiteman*, *ante*.

⁷ *Kethler v. Foster*, 22 Ohio St. 27.

upon the claim if it had been due from its date, and the statute is then set in motion. But, if the creditor makes a demand in fact within the last-named period, the running of the statute would start afresh from the time of such demand; and where the statute is put in motion by the operation of a presumption, it is not arrested except by circumstances which destroy or overcome the force of the presumption.¹ That a demand should be made within a reasonable time, appears from the dicta of many cases; but there are none, except those from Pennsylvania and Michigan, in which a right of action has been denied because of delay in making demand, although in a recent case² there had been a delay of nearly twenty years. As to what is a reasonable time in which to make a demand depends upon the circumstances of each particular case, and is one of fact for the jury;³ and the doctrine prevailing in equity as to stale demands has no force in a court of law, and a strictly legal right cannot there be denied simply because it is old. If a note or bill is given payable upon a contingency, as "one day after" the happening of a certain event, the statute is not put in motion until the day after such event transpires.⁴ In all cases where the word "months" is used in statutes of limitation or in contracts, unless otherwise provided by statute, lunar months is intended;⁵ and a note payable Feb. 27, 1869, payable

¹ As to presumptions in reference to demands, see *ante*, sec. 118, When Demand is necessary, &c. In all cases where a demand is necessary before a note becomes due and payable, it is held that such demand must be made within the period of limitation. *Craft v. Thomas*, 123 Ind. 513; *Landes v. Saxton* (Mo.), 16 S. W. 912. In *Dougherty v. Wheeler*, 125 Ind. 421, it was held that where a speedy demand or notice to pay would manifestly violate the intention and purpose of the contract by which the creditor stipulated to extend a reasonable time, or where delay in making demand was contemplated by the express terms of the contract, a demand need not be made within the statutory period. And in all cases if a demand is made the statute will begin to run from the time of such demand. *Coburn v. Monroe Baptist Ch.*, 60 Mich. 198; *Miller v. Hynes Co.* (Miss.), 8 So. 269.

² *Brown v. Rutherford*, 42 L. T. N. s. 659.

³ *Wallace v. Agry*, 4 Mas. (U. S. C. C.) 336.

⁴ *Hathaway v. Patterson*, 45 Cal. 294.

⁵ In *Hutton v. Brown*, 45 L. T. Rep. N. s. 343, this question arose under a lease of furniture for twenty-six months. *Fry, J.*, in passing upon the question,

said: "The question is whether, in this contract for letting chattels for twenty-six months, the word 'months' means calendar or lunar months. Now, in *Simpson v. Margitson*, 11 Q. B. 23, LORD DENMAN said, p. 31: 'It is clear that "months" denotes at law "lunar months," unless there is admissible evidence of an intention in the parties using the word to denote "calendar months." If the context shows that calendar months were intended, the judge may adopt that construction.' Here the context throws no light on the meaning, except that the contract for weekly payments, I think, implies that lunar rather than calendar months are meant, in spite of Mr. Wilkinson's elaborate calculations. Then it is said that in mortgage transactions months are always calendar months, and that this is a mortgage transaction. But the rule as to mortgages only arises from this, that the interest on mortgage money is a fixed yearly sum, and therefore half a year's interest is for six calendar months. I cannot expand this into a mortgage transaction. The primary transaction is not a mortgage at all; it is simply a contract for the hire of furniture. I therefore hold that the word 'months' means 'lunar' months."

twelve months after date, becomes due Feb. 27, 1870, and an action commenced March 1, 1873 (the statutory period being three years), is too late, even though the last day of February was Sunday.¹ A note payable "at any time within two years" does not become payable until the expiration of two years, unless the holder elects to demand the same before that time, and the statute does not begin to run thereon until the two years are ended, unless the holder before that time (as he may) puts the statute in motion by a demand.² The statute begins to run against the holder of a bill of exchange upon protest and notice for non-acceptance, although the bill is not then due, and he does not acquire a fresh right of action on the non-payment to the bill when due.³ His right of

¹ *Hathaway v. Patterson*, 45 Cal. 294. See also *Morris v. Richards*, 45 L. T. N. S. 210, to the same effect; also, *Hibernia Bank v. O'Grady*, 47 Cal. 579.

² *Creighton v. Rosseau*, 1 Iowa, 133.

³ In *Whitehead v. Walker*, 9 M. & W. 505, to an action of assumpsit by a fourth indorsee of a foreign bill of exchange against the first indorser, alleging non-payment by the drawee, the defendant pleaded that before the debt became due, and after the indorsement to the third indorsee, and before the indorsement to the plaintiff, the bill was refused acceptance and was protested, of which the third indorser and the plaintiff at the time of the indorsement to the plaintiff had notice, and that the defendant did not have due notice of the non-acceptance. To a demurrer to this plea a replication of *de injuria* was held good. In passing upon this important question, PARKE, B., said: "The question raised by the pleadings in this case is, whether, if the indorsee of a foreign bill of exchange has presented it for acceptance, and (acceptance having been refused) has duly presented it and given notice to the drawer (for the defendant, the indorser, is in the same situation), and so has acquired a right of action against him by reason of the non-acceptance, a new right of action afterwards accrues to him on the subsequent presentment of the bill for payment, and non-payment according to its tenor. The plaintiffs, indeed, are not the indorsees who presented the bill, but they are averred to have taken the bill with notice of the fact of presentment and dishonor, and therefore stand in the same situation, and are not to be considered as having a title as innocent indorsees. *Dunn v. O'Keefe*, 5 M. & Sel. 282. The practical

importance of the point in the present case arises from the delay of the holder in bringing his action. The non-acceptance and the protest thereon occurred in September, 1834. The bill, according to its tenor, would not be payable till the subsequent month of December, and this action was commenced in November, 1840; so that if a right of action accrued in December, 1834, the statute of limitations cannot be successfully pleaded; whereas, if there was no right of action accruing subsequently to the protest for non-acceptance in September, 1834, the statute is a bar.

"On the part of the plaintiff it was contended, that although he undoubtedly might have brought an action in the month of September, 1834, founded on the non-acceptance, yet it was optional with him to do so or not; that he might, if he thought fit, waive that action, and proceed merely on the ground of the subsequent non-payment in December, 1834. For the drawer of a bill, it was contended, enters into a double engagement with the payee, and through him with the successive holders of the bill, namely, *first*, that the drawee shall accept the bill when regularly presented to him for acceptance; and, *secondly* that he shall pay the bill when regularly presented to him for payment. And if this be a correct representation of the engagement entered into by the drawer, the conclusion seems unavoidable, that whatever right of action the holder might have acquired by the non-acceptance, he certainly is not precluded from suing in respect of the default of payment. But we are of opinion that the contract entered into by the drawer is not such as is contended for by the plaintiff, and that he in fact enters

action becomes complete and perfect from the time of non-acceptance,¹ and the statute begins to run from that time.²

into one contract only; namely, in the case of a bill made payable after sight, that the drawee shall, on the bill being presented to him in a reasonable time from the date, accept the same, and having so accepted it, shall pay it when duly presented for payment according to its tenor; and in the case of a bill payable after date, that the drawee shall accept it if it is presented to him before the time of payment, and having so accepted it, shall pay it when it is in due course presented for payment; or if it is not presented for acceptance at all, then that he should pay it when duly presented for payment.

"The counsel for the plaintiff, in support of his view of the law, relied mainly on some passages which he cited from the work of Marius on Bills of Exchange, some of which are adopted in Comyns's Digest, tit. 'Merchant' (F. 8) and (F. 9). But with respect to those passages, we must remark

that the work of Marius, though undoubtedly one of authority in its way, is scarcely to be looked at as a legal treatise on the subject of bills of exchange. It is, as its title imports, a work giving good practical advice from a practical man to persons receiving and negotiating bills of exchange. The author was a public notary, who lived in the middle of the seventeenth century, when questions of mercantile law were much less perfectly understood than they are now. In some of his notions he was clearly mistaken; as, for instance, he considers the holder of a bill of exchange to be in all cases bound to present it for acceptance; and it seems very doubtful whether he supposed the effect of non-acceptance to be anything more than that of rendering it incumbent on the drawer to find better security for the satisfaction of the holder. It is not, however, absolutely necessary to decide that Marius is wrong, for he no-

¹ *Miller v. Hackley*, 5 Johns. (N. Y.) 384; *Weldon v. Buck*, 4 id. 144.

² The general rule on this subject is, that although the holder of a bill of exchange is not bound to present it for acceptance, yet if he thinks fit to do so, and acceptance is refused, he is bound to give notice of that fact to all the parties to the bill to whom he desires to resort for payment. *Molloy, de Jure Martimo*, b. 2, c. 10; *Chitty on Bills*, 272 (9th ed.); *Bayley on Bills*, 252. And after presentment for acceptance and refusal, a right of action vests immediately, and the holder need not again present the bill for acceptance. *Hickling v. Hardey*, 7 Taunt. 312; 1 Moore, 61. Or if he does so, and acceptance is again refused, he is not bound, if payment be also afterwards refused, to protest it for non-payment. *De la Torre v. Barclay*, 1 Stark. 7. For by the refusal of acceptance he acquires a complete cause of action against the drawer and the indorsers. *Starke v. Cheeseman*, 1 Ld. Raym. 538; 1 Salk. 128. It is at that period, accordingly, that the liabilities of all the parties to the bill are to be determined; and all who take the bill subsequently to the non-acceptance and protest, take it with all its

infirmities. *Crossley v. Ham*, 13 East, 498. Unless, indeed, in the case of a subsequent holder for value who takes it without notice of the dishonor. It follows from these principles of law, that another new cause of action cannot afterwards arise on the non-payment of the bill; if it could, then a recovery in an action brought on the non-acceptance would be no bar to a subsequent action against the same party on the non-payment. The drawing of a bill of exchange is the creation of a debt; it is evidence of an existing debt from the drawer to the payee. *Starke v. Cheeseman*, *ante*; *Macarty v. Barrow*, 2 Stra. 949; *Bishop v. Young*, 2 B. & P. 83; *Workman v. Leake*, Cowp. 22. And the contract of the drawer is, that another person, the drawee, shall take upon himself payment of such his debt, according to the terms of the bill; and the moment the drawee commits an unqualified breach of that engagement, the debt becomes payable immediately, and the right of action against the drawer is vested. And the existence of the two concurrent causes of action against the same party arising out of the same contract is repugnant to legal principles.

SEC. 126. Notes and Bills payable by Instalments.—Where a note or bill is made payable by instalments, the statute attaches to and begins to run upon each instalment as it becomes due,¹ and, according

where lays down the proposition now insisted on, namely, that after a protest for non-acceptance a second right of action accrues to the holder on the non-payment. He speaks, indeed, of the holder retaining the bill after non-acceptance, and applying for payment, and suing on default of payment; and this, as a matter of prudence, may probably be the wisest course which a party can pursue. In spite of the non-acceptance, the drawer still may pay the bill when at maturity, and the holder, having by protest and notice on non-acceptance put himself in a condition to sue the drawer, may very reasonably, as a matter of prudence, retain the bill, and endeavor to obtain payment when the bill is at maturity, and not involve himself in litigation until there has been a failure of payment as well as of acceptance. It by no means, however, follows, because this is spoken of as being, what probably it still is, the usual course, that any second right of action arises on the second default. For, let us consider, what is the nature of the right which the holder acquires on the default of the drawee to accept. It is clear (whatever might formerly have been considered on the subject) that by the non-acceptance, followed by the protest and notice, the holder acquires an immediate right of action against the drawer, — a right of action, be it observed, not in respect of any special damage from the non-acceptance, but a right of action on the bill, *i. e.* a right of action to recover the full amount of the bill. The effect of the refusal to accept is, according to the language of the Court of King's Bench in *Macarty v. Barrow*, as quoted by *WILMOT, C. J.*, in 3 Wils. 16, that the drawee says to the holder, 'I will not pay your bill; you must go back to the drawer, and he must pay you.' The holder thus acquires by the non-acceptance the most complete right of action against the drawer which the nature of the case admits, and no subsequent act or omission of the drawee can give him a more extensive right against the drawer than he has already acquired. But further, on failure of acceptance, the holder

is bound to give immediate notice to the drawer, and if he omits to do so, he forfeits all right of action against him, not only in respect of the default of acceptance, but also in respect of the subsequent non-payment. Now, it is very difficult to reconcile this doctrine with the notion that a new right of action arises from the non-payment; for if that were so, it could hardly be that such new right of action could be destroyed by the previous neglect to give notice of a matter unconnected with that out of which the second right of action is supposed to arise. The argument of the plaintiffs must be, that a second right of action on the bill arises from the default of payment in those cases only in which the holder has duly given notice of the non-acceptance, *i. e.* in those cases only in which the holder, by the hypothesis, must have already acquired a right of action precisely similar to and coextensive with that which is thus supposed to vest in him by the default of payment. This seems to us to be a proposition so much fraught with inconsistency, and so entirely destitute of principle and authority, that we cannot hold it to be law. It may be added, that if the law were as is contended for the plaintiffs, this inconvenience would follow, that the holder of a bill might at the same time be prosecuting two actions on the same bill against the same party, for the recovery of precisely the same sum."

¹ *Bush v. Stowell*, 71 Penn. St. 208. In *Burnham v. Brown*, 23 Me. 400; *Evans's Pothier*, 404; *Heywood v. Perrin*, 10 Pick. (Mass.) 228; *Tucker v. Randall*, 2 Mass. 283; *Eastabrook v. Moulton*, 9 Mass. 258, the rule was thus forcibly expressed: where a note is made payable in several annual payments, the cause of action for the first payment accrues as soon as it becomes payable, and the statute begins to run against from that time, and not from the time when the latest sum becomes due. The statute does not begin to run on a deposit note given by a member of a mutual insurance company, whereby he agrees to pay a sum certain, or any part thereof, "when required," and which by its terms

to the authority of a leading English case,¹ if a bill or note is made payable by instalments, with a provision that if one instalment fail the whole sum shall thereupon become due, the statute will commence to run upon the entire debt from the date of such default. It might be argued, however, that this is at variance with the well-known rule, that no one is obliged to take advantage of a forfeiture, — a point which does not appear to have been noticed in the argument, and which is entitled to considerable weight in such cases. It would seem, upon a fair application of the last-named rule, that the debtor by his default put himself in a position where his creditor might, if he elected to do so, treat the whole debt as due; but it seems somewhat unreasonable to say that he thereby compels the creditor to treat the whole debt as due, so that the statute is, even against the creditor's will, put in motion to defeat his claim. The doctrine of the case referred to would also seem to favor forfeitures, whereas it is usually held that they are odious in law.²

In the case of interest payable annually, while it is held that an action may be maintained therefor at the end of each year, although the principal debt is not due, yet, with singular inconsistency, it is held that, upon the ground that the principal carries with it all accessories, the statute does not begin to run upon any part of the interest until the principal debt matures.³ But there are authorities, of respectable courts, which hold a contrary doctrine, and that the statute begins to run as to interest upon notes, where the interest becomes due and payable before the principal debt, from the time when it becomes due.⁴

But, as will be seen,⁵ where coupons are given for interest, the statute begins to run thereon from the date of their maturity, whether they are detached from the instrument on which the interest accrued or not, as each of them is a negotiable instrument and evidence of a distinct and independent debt.

In the case of a note payable with interest annually, a voluntary payment of the interest operates to keep the principal debt on foot, because it amounts to an acknowledgment of it as still subsisting, and affords a ground for an implied promise to pay it;⁶ but the recovery of the interest in an independent action brought therefor does not have that effect, because the payment is involuntary and repels rather than sustains any implied promise to pay the debt from which the interest arose.⁷

is a part of the absolute funds of the company until an assessment is laid. *Bigelow v. Libby*, 117 Mass. 359.

¹ *Hemp v. Garland*, 4 Q. B. 519.

² See also *Banning on Limitations*, 26.

³ *Grafton Bank v. Doe*, 19 Vt. 463; *Henderson v. Hamilton*, 1 Hall (N. Y. Sup. Ct.), 314; *Ferry v. Ferry*, 2 Cush. (Mass.) 92. That an action lies as fast as the interest accrues due, see *Stearns v. Brown*, 1 Pick. (Mass.) 530; *Greenleaf v.*

Kellogg, 2 Mass. 568; *Cooley v. Rose*, 3 id. 221.

⁴ *Heywood v. Perrin*, 10 Pick. (Mass.) 228; *Bush v. Stowell*, 71 Penn. St. 208; *Burnham v. Brown*, 23 Me. 400; *Eastbrooke v. Moulton*, 9 Mass. 258.

⁵ *Post*, sec. 127, Coupons, &c.

⁶ *Green v. Greensboro College*, 83 N. C. 449.

⁷ *Morgan v. Rowlands*, *ante*; *Harding v. Edgecombe*, 4 H. & N. 872.

SEC. 127. Coupons, Interest Warrants, &c. — The statute of limitations begins to run against coupons or interest warrants from the time they respectively mature; and this is so even though they are not detached from the bond which represents the principal debt.¹ Such instruments are, if payable to bearer, negotiable, and a right of action accrues upon them as soon as they become due in the hands of any person who is the legal bearer of the same.² They are treated as promissory notes negotiable by the law merchant.³

¹ *Amy v. Dubuque*, 98 U. S. 470, same rule as to detached coupons; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *contra*, see *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Kenosha v. Lamson*, 9 id. 477. Where coupons are made payable semi-annually, on "presentation of the respective coupons hereto attached," it was held that an action could be brought thereon without presentation, although they need not be paid until delivered up. *Warner v. Rising Fawn Iron Co.*, 3 Woods (U. S. C. C.), 514.

² *Evertsen v. Nat. Bank of Newport*, 66 N. Y. 14; *Cooper v. Thompson*, 13 Blatch. (U. S. C. C.) 434; *Bailey v. Lansing*, 13 id. 424.

³ *Cooper v. Thompson*, *ante*. The rule in such cases is, that, unless the payor has put it out of his power to pay in the kind of property stipulated for, a note payable in specific articles, on demand, does not become due until demand is made; but when a demand has been made and the payee fails to pay, the payee then becomes entitled to be paid in money. Thus, the payee of a demand note payable in hemlock bark, given Feb. 19, 1863, demanded payment in the summer of 1863, according to its terms, requesting the defendant to have the bark peeled during the summer, the season for peeling bark, and delivered the next winter, usually the best time to draw it, all which the defendant agreed should be done. Held, that this demand was most appropriate to such a note, and the defendant by failing to answer it, as he promised, became liable to pay the note in money. The payee could therefore recover upon the money counts. *Read v. Sturtevant*, 40 Vt. 704. In *Thrall v. Mead*, 40 Vt. 540, a note dated March 14, 1832, made "payable in officer's fees as constable," although not in terms expressed to be payable on demand, or on request, was held by legal construction so payable; and no

demand having been made until 1859, it was held that the note was barred by the statute of limitations. Where a debt is payable in specific property, a new contract made before the debt has become payable, changing the mode of payment, and extending the time, needs no new consideration for its support. The general rule in case of such debt is, that no action accrues until request or demand, and that the statute does not commence to run until demand is made; but the creditor may be guilty of such unreasonable neglect in omitting to make demand as will set the statute in operation without demand. Where a note of \$400, dated Feb. 19, 1827, was payable in instalments in grain, the last instalment April 1, 1832, and in June, 1829, it was agreed between the plaintiff and maker that the plaintiff should not call for the grain until the last instalment became payable; and in the mean time the maker was to render such services as constable for the plaintiff as he should call for, from time to time, which were to apply on the note; and before April 1, 1832, the parties agreed that the balance due should be postponed to an indefinite period, and that the plaintiff should still continue to receive his pay in the services of the maker as constable, the latter agreeing to render such services as called for from time to time, and if any balance still remained due, after deducting such services, the same should be payable at any time after April 1, 1832, in grain, upon giving reasonable notice to pay in grain, — it was held that no new consideration was required to support this agreement as to mode of payment or extension of time. It was held that this case was distinguishable from those where the debt was already due and payable in money when the new agreement was made; and the maker having ceased to be constable in 1845, the

When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided.¹ In that case, an action was brought against the county to recover the principal and interest upon certain bonds and coupons issued by the county. By the statute of limitations existing at that time in Nevada, some of the coupons were barred. But there had been this special legislation in reference to those coupons: The bonds were issued under the funding act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer thereafter paying the coupons, as money came into his possession applicable thereto, in the order of their registration. The coupons, which by the statute of limitations would have been barred, were presented, as they fell due, to the treasurer for payment, and payment demanded and refused because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877, and from the time of their registration to the commencement of this action there was no money in the treasury applicable to their payment.

BREWER, J., in delivering the opinion of the court said: "This act provided for registration and for payment in a particular order, for a new provision for the payment of these bonds which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund to which the coupon holder might in the order of registration look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons in the order of their registration, as fast as money came into the interest fund, and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute until he shows that that fund has been provided."² Each coupon upon a bond, municipal or otherwise, is a complete instrument capable of sustaining separate actions without reference to the maturity or ownership of the bonds.³ And it seems that interest upon these coupons is collectible from the time when they become due.⁴ In the case last cited the court, recognizing the fact that many courts of high authority disallow interest upon interest, followed that rule; yet

balance then unpaid on the note became payable in grain upon reasonable notice or demand by the plaintiff, and it was held that six years from 1845 was the limit of a reasonable time in which to make demand, and that after the expiration of that six years the statute began to run.

¹ *County of Lincoln v. Nicholas Luning*, 133 U. S. 529.

² *Underhill v. Sonora*, 17 Cal. 172; *Freehill v. Chamberlain*, 65 Cal. 603; see also, *Nash v. Eldorado Co.*, 24 Fed. Rep. 255.

³ *Amy v. Dubuque*, 98 U. S. 470; *Comm'rs of Knox Co. v. Aspinwall*, 21 How. (U. S.) 539; *Koshkonong v. Burton*, 104 U. S. 668.

⁴ *Mills v. Jefferson*, 20 Wis. 50.

it expressed its approval of that doctrine in which it was adjudged that an express agreement in a note or bond to pay interest at a specified time, as annually or semi-annually, entitled the holder to interest upon interest from the time it became due. For, said the court, when a person agrees to interest at a specified time, and fails to keep his undertaking, why should he not be compelled to pay interest upon interest from the time he should have made the payment. If he undertakes to pay a sum in a given time to the owner, and makes default, the law allows interest on the sum wrongfully withheld, from the time he should have made such payment.¹

SEC. 128. **Notes payable in Specific Articles.** — Where a note is made payable in specific articles on demand, an action cannot be maintained thereon until a demand is made for payment. Thus, where a note was made payable “in produce or wood from the farm on demand as the payee may want to use the same,” it was held that a lapse of twelve years without a demand did not bar an action on the note, in the absence of proof when as a matter of fact a reasonable time for making the demand expired, or of facts from which the law would assume a limit to such reasonable time; ² and the same rule was adopted in a case where a note was made payable in “bankable paper when wanted.” ³ But if a note is payable in specific articles, and the time and place of payment is fixed, the plaintiff’s right of action becomes complete, unless the payee was present at the place on the day fixed for payment, ready to perform; in all other cases, however, a demand before action brought is necessary to put the statute in motion.

The rule in such cases is that unless the payor has put it out of his power to pay in the kind of property stipulated for, a note payable in specific articles on demand does not become due until demand is made; but when a demand has been made, and the payor fails to pay, the payee then becomes entitled to be paid in money. Thus, in a Vermont case,⁴ the payee of a demand note, payable in hemlock bark, payable Feb. 19, 1863, demanded payment in the summer according to its terms, requesting the defendant to have the bark peeled during the summer, the season for peeling bark, and delivered the next winter, usually the best time to draw it, all which the defendant agreed should be done. It was held that this demand was most appropriate to such a note, and the defendant by failing to answer it, as he promised, became liable to pay the note in money.

In another Vermont case,⁵ a note dated March 14, 1832, made payable in officer’s fees, as constable, although not in terms express, to be payable on demand or on request, was held by legal construction so payable,

¹ See also *Walnut v. Wade*, 103 U. S. 683; *Genoa v. Woodruff*, 92 U. S. 902; *Aurora v. West*, 7 Wall, 82; *Gelpcke v. Dubuque*, 1 id. 175; *Pruyn v. Milwaukee*, 18 Wis. 367.

² *Stanton v. Stanton*, 37 Vt. 411.

³ *Harbor v. Morgan*, 4 Ind. 158.

⁴ *Read v. Sturtevant*, 40 Vt. 04.7

⁵ *Thrall v. Mead*, 40 Vt. 540.

and no demand having been made until 1859, it was held that the note was barred by the statute of limitations. Where a debt is payable in specific property, a new contract made before the debt has become payable changing the mode of payment and extending the time, needs no new construction for its support. The general rule in case of such a debt, is that no action accrues until request or demand, and that the statute does not commence to run until the demand is made; but the creditor may be guilty of such unreasonable neglect, in omitting to make demand, as will set the statute in motion without demand. Where a note of \$400, dated Feb. 19, 1827, was payable in instalments in grain, the last instalment April 1, 1832; and in June, 1829, it was agreed between the plaintiff and the maker that the plaintiff should not call for the grain until the last instalment became payable, and in the mean time the maker was to render such services as constable for the plaintiff as he should call for from time to time, which were to apply on the note, and before April 1, 1832, the parties agreed that the balance due should be postponed to an indefinite period, and that the plaintiff should still continue to receive his pay in the services of the maker as constable, the latter agreeing to render such services as were called for from time to time, and if any balance still remained due after deducting such services, the same should be payable after April 1, 1832, in grain. Upon giving reasonable notice to pay in grain, it was held that no new consideration was required to support this agreement as to mode of payment or extension of time, and that the case was distinguished from those where the debt was due and payable in money when the new agreement was made, and the maker having ceased to be constable in 1845, the balance then unpaid on the note became payable in grain, upon reasonable notice or demand by the plaintiff, and six years from 1845 was the limit of a reasonable time in which to make demand, and after the expiration of that six years the statute began to run.¹

SEC. 129. Notes subject to Assessment. — Where, as is the case with notes given to mutual insurance companies, premium notes are given, subject to assessment by the company, at such times and in such sums, not exceeding in all the sum for which the note is given, but not payable in full, at all events, the statute does not attach to the note at all, until an assessment is made by the company for the purposes contemplated and a demand is made therefor, or the method of notice provided by statute has been complied with, and then it attaches only to the amount assessed, and begins to run thereon from the date of notice or demand, leaving the balance unaffected by the statute.² But, in

¹ Thrall v. Mead, 40 Vt. 540.

² Hope Mut. Ins. Co. v. Perkins, 2 Abb. App. Dec. (N. Y.) 383; Hope Ins. Co. v. Weed, 28 Conn. 51; Howland v. Edmonds, 24 N. Y. 307; Howland v. Cuykendall, 40 Barb. (N. Y.) 320; Sands v. St. John, 36 id. 328; Savage v. Medbury, 19 (N. Y.) 82. Thus in Sands v. Lilienthal, 46 N. Y. 541,

it was held that where a premium note given to a mutual insurance company, which has been regularly assessed to its full amount, the time of payment fixed, and notice of the assessment duly published, the statute begins to run from that date, without a personal demand. *In re Slater Mut. Fire Ins. Co.*, 10 R. I. 42.

case the statute does not provide the manner in which notice of such assessment shall be given, the statute does not begin to run thereon until demand is made therefor.¹ But a different rule is adopted where the statute provides the manner in which notice of the assessment shall be given, and the statute in such cases begins to run from the time when notice as required by the statute is given.² And the same rule prevails as to guaranty notes, or notes given as a part of the capital of the company, assessable as the directors may direct.³ But in New York, in the cases last cited, it was held that where such notes are payable at all events, although in terms payable at such times and in such portions as the directors may require, they are nevertheless in legal effect payable on demand. But this is upon the ground that the statute required all such notes to be made payable within twelve months, consequently they are treated as due absolutely and immediately, and that the statute begins to run thereon from their date. But in a Connecticut case,⁴ a doctrine apparently different from this was held; but an examination of the latter case shows that there is in reality no conflict of doctrine. In that case, a note was given in the following terms:—

\$2,500.

NEW YORK, 1st May, 1847.

Twelve months after date, or sooner if required, I promise to pay to the Hope Mutual Life Insurance Company of Stamford, Connecticut, or order, two thousand five hundred dollars, or such assessments on the same as the trustees find it necessary to impose, for the purpose of paying losses, agreeably to the terms of my subscription to the guaranty fund of said company, dated 19th April, 1847, for value received.

NATHL. WEBB.

It will be observed that this note in terms is made payable in twelve months from its date; but it is also made subject to the terms and conditions of the defendant's subscription to the guarantee fund of the company, of the date named,⁵ and that was as follows: "Whereas it has been deemed advisable by the Hope Mutual Life Insurance Company of Stamford, Connecticut, to create a fund for the indemnity of persons insured by said company, as a security in addition to expected

¹ *Sands v. Annesley*, 56 Barb. (N. Y.) 598; *Howland v. Cuykendall*, 40 id. 320.

² *Sands v. Lilienthal*, *ante*.

³ *Howland v. Edmonds*, 24 N. Y. 307; *Bell v. Yates*, 33 Barb. (N. Y.) 627; *Sands v. St. John*, 36 id. 682; *Colgate v. Buckingham*, 37 id. 177. In *Western R. R. Co. v. Avery*, 64 N. C. 491, it was held that the statute begins to run against an action upon a subscription to stock of a corporation as to each instalment called in,

from the time the directors make the call.

⁴ *Hope Mut. Life Ins. Co. v. Weed*, 28 Conn. 51.

⁵ And there were no statutory provisions in Connecticut requiring such notes to be made payable absolutely within twelve months from date, as there were in New York, under which the cases from that State were decided. *Bell v. Yates*, 33 Barb. (N. Y.) 627; *Sands v. St. John*, 36 id. 628; *Howland v. Edmonds*, *ante*.

profits, the subscribers hereto have agreed with the said company to contribute to the said fund the amounts respectively set opposite their names, by giving their promissory notes payable in one year, upon the condition that the same shall be held by the said company for the sole purpose of paying losses which shall accrue upon the policies issued by the said company, and shall not be used until the other funds in the hands of said company shall have been first applied; that, for any deficiency after the application of said funds on account of such losses, the said notes shall be subject to assessment for the amount required; that the said indemnity fund shall in no event be liable for the expenses of said company, or claims against them, other than those arising upon policies issued by them; and in the latter case, only after all other funds of said company have been exhausted; that for the loan of said notes the subscribers shall be entitled to an allowance at the rate of six per cent per annum, so long as the said company shall hold the said security; that, whenever a surplus of capital shall have been acquired by the company out of the profits of business, to the amount of \$25,000, the indemnity herein provided shall cease, and the notes or securities shall be returned to the subscribers respectively; it being, however, understood that the subscribers hereto may, in lieu of having such return, absorb the amount of their notes in premiums or policies on their own lives, or lives of others procured through their agency. To which terms and conditions the said company assent, and agree to hold the said security in conformity thereunto. Stamford, 19th April, 1847." This the defendant and others subscribed; and in compliance with its terms the note in suit was executed, and made subject to it. In 1854 an assessment of seventy-five per cent was rendered necessary, and was properly made upon the note. The defendant insisted that the note became due absolutely in twelve months from its date, and that it was barred by the statute. But the court held that it must be construed in connection with the agreement, and that by its terms no action could be sustained upon it until an assessment was made upon it, and that the statute did not begin to run upon any part of the note until that time. In this respect, the case differed from the New York cases, and cannot, in any sense, be said to conflict with them.¹ Where security notes are given to joint-stock insurance companies which, by the terms of its charter, are to become its absolute property, the statute begins to run thereon from the time they respectively become due.² Where a right to assess stockholders of a corporation of any kind exists by statute, the statute only begins to run thereon when an assessment is lawfully made.³

SEC. 130. Bill of Exchange payable at Particular Place. — Where a bill of exchange is made payable at a particular place, as at the

¹ See also *Hope Mut. Life Ins. Co. v. Taylor*, 2 Robt. (N. Y. Sup. Ct.) 278, where the same rule is adopted.

² *Osgood v. Strauss*, 55 N. Y. 672.

³ *Com. v. Cochituate Bank*, 8 Allen (Mass.), 42.

Granite Bank in Boston, it does not become due and payable, so that an action can be maintained thereon until after a demand at that place and its dishonor there; ¹ "therefore," says STORY, J., in the case last cited, "the statute of limitations begins to run from the time of such demand, and not from the time when the bills were payable according to their tenor." ² The liability of the drawer of a bill of exchange to a subsequent indorser dates from the dishonor of the bill, and not from the time when the indorser paid it. ³

SEC. 131. **Bills accepted after Maturity.**—As a bill of exchange may be accepted after it is overdue, ⁴ there can be no doubt that the statute begins to run thereon from the date of its acceptance, although this precise question does not seem to have been decided. ⁵ But in the case of a note dated January 1, but not delivered until July 1, it has been held that the statute begins to run thereon from the day of its issue, and not from the day of its date; ⁶ but in the case referred to the note was payable on demand, and was delivered to a third person in escrow until certain conditions had been complied with. ⁷ In another English case, ⁸ a married woman, being administratrix, received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory notes of her husband and two other persons, payable to her with interest. The note was dated Nov. 20, 1817. The husband died in 1827, and after his death, to an action brought by her against the other parties to the note, they set up the statute of limitations in bar of the action. The court held that, although she could not have maintained an action on the note during her husband's lifetime, yet, that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action thereon at any time within six years from the time of his death.

But, while the rule as stated might prevail as to notes payable on demand or as to bills indorsed when overdue, such is not the rule as to the indorsement of a note by a third person payable at a fixed time after it becomes due. In the latter case, the statute runs from the time when the note became due; and the indorsement, instead of creating a new contract so as to start the running of the statute afresh from that date, is merely accessory to the old contract, and does not suspend or in any wise affect the operation of the statute on the note. ⁹ But the maker

¹ *Picquet v. Curtis*, 1 Sum. (U. S. C. C.) 478. This also is the rule in France, art. 123, Code of Commerce; also arts. 173 and 174, according to STORY, J., in the foregoing case.

² *Rowe v. Young*, 2 B. & B. 165.

³ *Hunt v. Taylor*, 108 Mass. 508.

⁴ *Williams v. Winans*, 14 N. J. L. 339; *Spaulding v. Andrews*, 48 Penn. St. 413.

⁵ Benjamin's Chalmers's Digest, art. 252, subd. 2.

⁶ *Savage v. Aldren*, 2 Stark. 232.

⁷ *Hill v. Henry*, 17 Ohio, 9; *Richards v. Richards*, 2 B. & Ad. 447.

⁸ *Richards v. Richards*, *ante*.

⁹ *Scarpelini v. Atchison*, 7 Q. B. 864. See *Webster v. Kirke*, 17 id. 947, where it was suggested that, as to the statute of limitations, under such circumstances, the

of the note may revive it by indorsing his name on the back thereof after the statute has run upon it. Thus, the maker of a note, twenty years after its maturity, signed his name on the back of it, and it was held that an action lay against him on the note at any time within six years from the date of such indorsement,¹ as such indorsement operated as an acknowledgment in writing that the debt is due and payable, and also to a new promise to pay it.²

SEC. 132. Bills and Notes subject to Grace. — Where a bill, note, or other obligation is subject to grace, the statute begins to run thereon only from the last day of grace.³ But, the mercantile usage in the matter of grace, having the effect of law, where a bill or note falls due on Sunday it is treated as due on the previous Saturday, and the statute begins to run from that time. Thus, in an English case⁴ involving this question, WILLS, J., thus stated both the facts of the case and the law applicable thereto. He said: "This is an action on a promissory note at three months, dated 11th March, 1874, which would, therefore, *prima facie*, be due on the 14th June, 1874. The 14th June, 1874, was a Sunday. The writ in the action bears date the 14th June, 1880. The defence is that the cause of action did not accrue within

holder for the time being might be treated as a trustee of the action; so that prior or subsequent indorsees are, as between themselves and earlier parties, prejudiced by his laches.

¹ Bourdin *v.* Greenwood, L. R. 13 Eq. 281.

² See Chasemore *v.* Turner, L. R. 10 Q. B. 500; *In re Steamer Co.*, L. R. 6 Ch. App. 828, as to the requisites of an acknowledgment in writing.

³ Pickard *v.* Valentine, 13 Me. 512; Kimball *v.* Fuller, 13 La. An. 602. An action brought upon a note or bill upon the day it becomes due is premature. Skidmore *v.* Little, 4 Tex. 301; Wilcombe *v.* Dodge, 3 Cal. 260; and if the note is entitled to grace, an action on the last day of grace is also premature, Smith *v.* Aylesworth, 40 Barb. (N. Y.) 104; Oothout *v.* Ballard, 41 id. 33. The maker has the whole of the last day of grace to pay the note in Taylor *v.* Jacoby, 2 Penn. St. 495; Wiggle *v.* Thompson, 19 Miss. 452; Lunt *v.* Adams, 17 Me. 230. But in Maine it is held that an action may be commenced on the last day of grace if there has been a demand made, or if the note is payable at a bank, and the suit is commenced after banking hours, Veazie Bank *v.* Winn, 40 Me. 62; Vandesande *v.* Chapman, 48 Me.

262; but this is not the general rule, and the cases generally make no distinction in this respect, because a note is payable at a bank, Smith *v.* Aylesworth, *ante*; Oothout *v.* Ballard, *ante*. In South Carolina it is held that a person may be sued on a note or bill on the last day of grace. McKenzie *v.* Durant, 9 Rich. (S. C.) 61; Wilson *v.* Williams, 4 N. & McCord (S. C.), 440. Another matter in reference to notes or bills, so far as the time when a right of action accrues against an indorser is concerned, must be borne in mind, and that is: that an action will not lie against him, nor against a drawer of a bill, until every preliminary step has been taken necessary to fix his liability absolutely. Green *v.* Darling, 15 Me. 139. Consequently if he lives in the same town or city, an action will not lie against him until notice of protest is actually served, New England Bank *v.* Lewis, 2 Pick. (Mass.) 125; whereas if he lives in another town, an action lies immediately after the notice is put into the post-office, Shed *v.* Brett, 1 Pick. (Mass.) 401; Stanton *v.* Blossom, 14 Mass. 116; Flint *v.* Rogers, 16 Me. 67.

⁴ Morris *v.* Richards, 45 L. T. N. S. 210; reported also 25 Alb. L. J. 53. See also Hibernia Bank *v.* O'Grady, 47 Cal. 579, to the same effect.

six years before the commencement of the action. The general rule of law is, that when the last of the days of grace falls on a Sunday, the bill or note is payable on the Saturday. It is contended, however, that though the note was payable on the Saturday, no cause of action arose till the expiration of the third day of grace; in short, that although after business hours on the Saturday nothing that the maker of the note could do could prevent the state of things then constituted from ripening into a cause of action, none existed until after twelve o'clock on Sunday night, — a proposition which there is no difficulty in understanding, but for which, as it seems to me, there is no authority. The so-called period of grace is not a definite period laid down by express enactments; its existence is an incident annexed by mercantile usage to a bill or note. It has its origin and foundation in mercantile usage and nothing else. As late as 1695 it was still the subject of evidence, and proved like any other mercantile custom by the testimony of witnesses.¹ It must be taken now to be established as a part of the law mercantile, that a bill or note which, according to its terms, imports an obligation to pay on a given date, really obliges the party to pay in ordinary cases on the third day after each date; but looking to the way in which that proposition, now one of law, has come to be one of that nature, it is evident that it merely expresses the result of the general practice of mercantile men, and that the proposition must be taken subject to such limitations as are established by equally universal practice. One of those limitations is that if the third day be a Sunday the bill or note is payable on the previous day. *Prima facie*, the obligation to pay on the third day in the one case, and on the second in the other, must rest upon grounds of precisely the same kind; namely, it must depend upon the universal practice that payment which *prima facie* would have to be made on a given day was made at a date later by three days in the one case and by two in the other. I see, therefore, no ground *prima facie* for supposing that different consequences are to follow if the third day in the one case, or second day in the other, be allowed to elapse without payment having been made. In either case, *prima facie* the cause of action is complete, and it lies upon those who set up the distinction to establish it. If it exists at all, it must be by virtue of mercantile usage so well recognized among mercantile men as to have passed into law. Not only is there no trace of it in any book, but it is very difficult to see how there could ever have been such a state of things as would have afforded evidence of such a custom, excepting in such a case as the present. There would not and there could not be any thing to bring it to the test, unless a writ could be issued on Sunday, and unless it were frequently material whether the writ were issued, or at all events issuable, on the Sunday instead of the Monday. No custom amongst mercantile men could

¹ Tassell v. Lewis, 1 Ld. Raym. 743.

grow up in respect to such a matter, and it is inconceivable that at the date when *Tassell v. Lewis*, *ubi sup.*, was tried before HOLT, C. J., any such proposition could have been established by evidence. For these reasons I am of opinion that the cause of action arose as soon as the 13th June, 1874, was passed, and that, subject to a second question now to be considered, the writ issued on the 14th June, 1880, was a day too late. It happens, however, that the 13th June, 1880, was a Sunday, so that no writ could be issued on that day, and it is said that under Order LVII. r. 3, of the first schedule to the Judicature Act of 1875, the cause of action did nevertheless arise within six years of the commencement of the action. I am of opinion that this rule has no such application in this case. The "time for doing any act" in this rule refers to times limited by the practice of the court for taking proceedings; and the effect of the rule is, that in the cases to which it is applicable, a proceeding which but for that enactment would not, if taken on Monday, be duly taken according to the practice of the court, whether established by definite enactment or otherwise, shall nevertheless be held to be duly taken. It certainly was never intended that the provision should affect the statute of limitations. The writ in this case was "duly issued" on the Monday, without the protection of Order LVII. r. 3, and there is nothing in the enactment to alter the actual date of the commencement of the action. For these reasons, my judgment must be for the defendants, and with costs."

In a California case,¹ a note was given dated Feb. 27, 1869, payable twelve months after date, and it was held that it fell due Feb. 27, 1870; and that an action commenced on it March 1, 1873, was too late to save the note from the operation of the statute, although the last day of February, 1869, was Sunday.

SEC. 133. Notes Payable upon the happening of a Contingency.—Where a note made payable upon the happening of a certain event also contains a clause as follows: "or as soon as otherwise convenient,"—it is payable in a reasonable time; and if the maker makes a payment thereon within a certain time, as within sixty days from its date, the parties will thereby be treated as having fixed upon that as a reasonable time, and the statute will begin to run on the note from that time.² If, however, there are no qualifying words, but a certain event or contingency is absolutely fixed upon, the statute will not begin to run until the event or contingency occurs.³

An accommodation indorser, or one who indorses for the maker without any consideration, cannot recover of the maker except upon the note; consequently as to him the statute begins to run from the time the note became due, and not from the time of its payment by him;⁴ and although he paid the note before the statute had run thereon, yet

¹ *Hibernia Bank v. O'Grady*, *ante*.

² *Jones v. Eisler*, 3 Kan. 134.

³ *Gueno v. Soumastre*, 1 La. An. 44.

⁴ *Williams v. Durst*, 25 Tex. 667.

if more than six years have elapsed between the time the note became due and the commencement of the action, he cannot recover of the maker. In other words, his relation to the note by its payment is simply the same that the holder held thereto, and he can enforce no right against the maker which the holder could not enforce.¹ But in the case of an accommodation acceptor it is held that the statute begins to run from the time he pays the bill, and not from the time when it became due.²

SEC. 134. Indorser of Notes or Bills. — The indorsement of a bill after it is dishonored creates a new contract as to the indorser and indorsee. Thus, if A. is the holder of a dishonored bill, and three years afterwards he indorses it to B., while the indorser must sue the acceptor within six years from the time when the bill matured, yet he has six years from the date of the indorsement in which to sue A.³ The reason for this rule is that by the indorsement the indorser contracts to pay the bill if the acceptor does not; and as the indorsement creates a new contract as between him and the indorser, it outlives the validity of the bill as to the other parties, and the statute only begins to run from the date of indorsement, because that is the time when the right of action accrues against the indorser.⁴

No cause of action arises against an indorser of a promissory note payable on demand, at a place specified, until demand is made in compliance with the terms of the contract and due notice of non-payment; a demand by letter is insufficient. The holder of the note is not chargeable with neglect for omission to make such demand within a particular time. Until, therefore, demand is made at the place named, the statute of limitations does not begin to run in favor of the indorser.⁵

SEC. 135. Acceptor of Bill. — The statute runs in favor of the acceptor of a bill who accepted it before it became due, from the day the bill becomes payable, and not from the date of the acceptance;⁶ but if a blank acceptance is given to a person, and ten years afterwards he fills it up as a bill payable three months after date, and negotiates it to a *bona fide* holder, the statute does not begin to run thereon until it is payable.⁷ If, however, a bill is accepted after it is due, the statute begins to run from the date of acceptance, because it is payable *instantly*.⁸

SEC. 136. Drawer of Bill. — If a bill of exchange drawn payable sixty or any other number of days after sight, is presented for acceptance before it becomes due, and is dishonored by non-acceptance, the statute begins to run in favor of the drawer from the time when it was so dishonored and notice thereof sent to the drawer, and not from the

¹ Williams v. Durst, *ante*; Woodruff v. Moore, 8 Barb. (N. Y.) 171; Kennedy v. Carpenter, 2 Whart. (Penn.) 344; Hoyt v. Reed, 2 Blackf. (Ind.) 369.

² Reynolds v. Doyle, 2 Scott N. P. 45. In Bullock v. Campbell, 9 Gill (Md.), 182, this was also held to be the rule in the case of an accommodation indorser.

³ Benjamin's Chalmers's Digest, 256.

⁴ Woodruff v. Moore, 8 Barb. (N. Y.) 171; Whitehead v. Walker, 9 M. & W. 506.

⁵ Parker v. Stroud, 98 N. Y. 379, reversing 31 Hun, 578.

⁶ Holmes v. Kerrison, 2 Taunt. 323; Fryer v. Roe, 12 C. B. 437.

⁷ Montague v. Perkins, 22 L. J. C. P. 187.

⁸ Benjamin's Chalmers's Digest, 256.

time when it becomes payable.¹ But if a person accepts a bill to accommodate the drawer, and afterwards pays it, the statute begins to run from the time of payment, upon the implied agreement to indemnify him, and not from the maturity of the bill.² But it seems that, in such a case, if the action is brought upon the bill instead of upon the implied contract to indemnify, the statute runs from the time when the bill was payable.³

SEC. 137. Suspension of Statute by Agreement of the Parties. — The running of the statute may be suspended by the mutual agreement of the parties.⁴ Thus, in a Virginia case,⁵ a mutual understanding and agreement between the debtor and creditor that a suit should not be brought upon an account until the debtor should go to Europe, and return, was held a good answer to the act of limitations during his absence from the country, and also competent proof to prevent the court from expunging from such account items that were apparently barred by the statute. In a Texas case,⁶ in an action on a note the defendant filed an account in offset, to which the plaintiff set up the statute of limitations. It being shown that the articles charged in the account were by agreement to go in reduction of the note, it was held that the account was saved from the operation of the statute by the agreement. But, in order to suspend the operation of the statute, there must be an agreement for delay; and the mere fact that nego-

¹ *Whitehead v. Walker*, *ante*; *Woode v. McMeans*, 23 Tex. 481; *Bullock v. Campbell*, 9 Gill (Md.), 182; *Webster v. Kirk*, 17 Q. B. 944; *Godfrey v. Rice*, 59 Me. 308. See, as to notice when notice is necessary, *Manchester Bank v. Fellows*, 28 N. H. 302; *Shed v. Brett*, 1 Pick. (Mass.) 401.

² *Angrove v. Tippet*, 11 L. T. N. S. 708; *Reynolds v. Doyle*, 1 M. & G. 753; *Burton v. Rutherford*, 49 Mo. 72; *Huntley v. Sanderson*, 1 C. & M. 467; *King v. Hannah*, 6 Bradw. (Ill.) 495.

³ *Webster v. Kirk*, *ante*. But *contra*, see *Kennedy v. Carpenter*, 2 Whart. (Penn.) 344; *Woodruff v. Moore*, 8 Barb. (N. Y.) 171.

⁴ In *Webber v. Williams College*, 23 Pick. (Mass.) 302, a debtor, before the statutory bar had become complete, proposed to the creditor that if he would forbear bringing his action at that time, he should continue to have the same rights for one year more than he then had, and the creditor answered that he would not consent thereto, but did not in fact commence his action until after the year nor until the statute had run upon the claim, it was held that this was a sufficient compliance with the debtor's proposal, and estopped the debtor from setting up the statute. In *Rowe v. Thompson*, 15 Abb. Pr. (N. Y.) 377, a debtor procured his

creditors to sign an instrument by which they bound themselves not to sue or molest him for his indebtedness for two years, and it was held that so doing was equivalent to an agreement not to plead the two years as a part of the statute of limitations, and operated to extend the limitation of the statute two years. In *Reynolds v. Johnson*, 9 Humph. (Tenn.) 444, where a creditor's claim against an executor was barred by the statute of limitations, but the legatees agreed with the executor and the creditor that the executor should pay the debt and receive a credit on settlement with the legatee, and the executor was credited with the amount accordingly, it was held that the executor could not set up the bar of the statute in an action by the creditor to recover the debt. But in *Ball v. Wyeth*, 8 Allen (Mass.), 275, an agreement by a creditor to extend the right to redeem land which is mortgaged to him to secure his debt, and not to foreclose the mortgage for a specified time, was held not to have the effect to extend the personal liability of the debtor beyond the time at which it would otherwise cease by the lapse of the statutory period.

⁵ *Holladay v. Littlepage*, 2 Munf. (Va.) 816.

⁶ *Baird v. Ratcliff*, 10 Tex. 81.

tiations for a settlement or for a reference are pending, there being no agreement for a delay, and the defendant having done nothing to mislead the plaintiff, will not suspend the running of the statute.¹ It is held in those States in which an acknowledgment or new promise is required to be in writing, that an agreement to suspend or waive the defence of the statute must also be in writing.² The running of the suspended statute starts afresh by the agreement of the parties, and this is done whenever a valid agreement predicated upon a sufficient consideration is entered into between the parties, by which the creditor agrees to give the debtor more time upon an overdue note or bill; and in such case the statute starts anew, and only begins to run again from the expiration of the period of credit so given.³ But in order to have this effect the agreement for the new credit must be such as is binding upon the creditor, and takes away all right of action upon the debt during the period agreed upon. Thus, in a Massachusetts case,⁴ after a note had become due, an indenture was executed between the maker and his creditors by which he assigned his property in trust for such of his creditors as should become parties to the indenture, and the creditors covenanted to discharge him from all claim or demand, action or right of action, for the space of seven years, upon receiving their respective portions of the property, and the plaintiff among others was a party to this indenture. It was held that the indenture did not suspend the running of the statute as to the note. In an English case,⁵ often cited, the parties entered into an agreement to go into an inquiry as to the amount of damage for an admitted breach of contract, and by the defendant's fault the inquiry was prolonged to such an extent that more than six years had elapsed before the action was brought, and in answer to a plea of the statute the plaintiff insisted that the agreement had the effect to suspend the statute. But while the case was one of great hardship, and the court intimated an intention to do all it could to relieve the plaintiff, yet it felt obliged to hold, as it did, that such was not the effect of the agreement, and that the statute bar had become complete before the action was brought. "The rule," said LORD CAMPBELL, "is firmly established, that in assumpsit the breach of contract is the cause of action, and that the statute runs from the time of breach." A mere request by the debtor to the creditor to delay suit, of itself, is not sufficient to suspend the running of the statute.⁶

¹ *Gooden v. Insurance Co.*, 20 N. H. 73. In *Coleman v. Walker*, 3 Met. (Ky.) 65, the payee of a note refrained from prosecuting it against the sureties within the statutory period, at their request; but as there was no binding agreement for delay, and the sureties had done nothing to defeat or obstruct the payee in the prosecution of a suit on the note, it was held that they were not estopped from setting up the statute as a bar to the note. See also *Harvey v. Tobey*, 15 Pick. (Mass.) 99, where a

general assignment, with a covenant to discharge the debtor from all claim or demand, action or right of action, for seven years, was held not operative to suspend the running of the statute as to one of the creditors who was a party thereto.

² *Hodgdon v. Chase*, 29 Me. 47.

³ *Irving v. Veitch*, 3 M. & W. 90.

⁴ *Harvey v. Tobey*, 15 Pick. (Mass.) 99.

⁵ *E. India Co. v. Paul* 7 Moo. P.C.C. 85.

⁶ *Junior Steam Engine Co. v. Douglass*, Penn. S. C. March, 1882.

SEC. 137a. Goods sold on Credit to be paid in Note within Certain Time.—Where goods are sold on a credit to be paid for at the expiration of six months in a note or bill at two or three months, it is held to be a sale, in effect, upon nine months' credit; so that an action brought at any time within six years from the end of the nine months would be in time.¹ Thus, in the case last cited, the defendant purchased a quantity of Spanish wool of the plaintiff on the 20th of May, 1823, under an agreement for six months' credit, payment at that time to be made by bill at two or three months, at the purchaser's option. Nothing was said in the invoice as to the time of payment, and no note or bill was given. The action was commenced Jan. 14, 1830, and was therefore barred by the statute if the goods were to be considered as purchased on a credit of six months. The plaintiff had a verdict on the ground that the time of credit was in fact eight or nine months, at the purchaser's option, and the verdict was sustained in King's Bench.²

SEC. 138. Bank Bills.—Under our present system of banking, the circulation of bills being through the government, and the government being responsible for their redemption, the statute of limitations does not apply thereto; nor, under the old system, did the statute attach to bank-bills until after they had been presented for payment and payment thereof refused.³ But if a bank suspends payment and closes its doors, so that it has no place of business, a demand is dispensed with, and an action upon its bills may be commenced at once; but it seems that the bank cannot claim the benefit of the statute from the time it closes its doors, but the holder of the bills may bring his action at his pleasure, the service of the writ being treated as a demand and the statute attaching from that date.⁴ In several of the States bank-bills are expressly excepted from the operation of the statute. Thus, in Maine,⁵

¹ *Helps v. Winterbottom*, 2 B. & Ad. 431.

² *LITTLEDALE, J.*, said: "If the contract was for six months' credit, and then a bill to be given for two or three, this action was in time. In *Dutton v. Salmonson*, 3 B. & P. 582, and some other cases decided about the same period, it was much discussed whether upon this peculiar kind of contract an action for goods sold and delivered would lie at the end of six months, and whether it was the proper form of action when the time had expired for which the bill was to be given. The result of the cases is, that at the end of the six months an action lies for not delivering a bill according to the contract, the party then being entitled not to payment, but to a better security for his money. In a suit, however, for this cause of action

the plaintiff probably would not recover anything approaching to the whole debt, and this is not the cause of action to which the statute of limitations would apply upon a declaration for goods sold and delivered. It appears to me that such a declaration after the expiration of the time for which a bill was to be given is correct, and that the action commenced within six years after the expiration of the two or three months is not barred by the statute." See also *Brooke v. White*, 1 N. R. 330; *Mussen v. Price*, 4 East, 147; *Price v. Nixon*, 5 Taunt. 338.

³ *Bank of Memphis v. White*, 2 Sneed (Tenn.), 482.

⁴ *Thurston v. Wolfborough Bank*, 18 N. H. 391.

⁵ Appendix, Maine.

all bills, notes, or other evidences of debt issued by a bank are excepted. In Vermont¹ the same exception exists as to the same class of obligations issued by any moneyed corporation. In Massachusetts² the same exceptions exist as in Maine. In New York³ the same exceptions exist as in Vermont. In Michigan⁴ the same exception exists as in Maine. In Arkansas⁵ the same exceptions exist as in Vermont. In Iowa⁶ the statute does not apply to evidences of debt intended to circulate as money, and, as will be seen by reference to the statutes given in the Appendix, such a provision exists in most of the States.

SEC. 139. **Witnessed Notes.**—In some of the States⁷ witnessed notes are expressly excepted from the operation of the statute and left to the operation of the common-law presumption of payment arising from the lapse of twenty years. In Vermont, while ordinary notes are barred in six years, witnessed notes are free from its operation for fourteen years from the time a right of action accrues thereon. In Massachusetts this class of notes is barred in twenty years, under a general clause in the statute extending to all personal actions not otherwise provided for. But, in order to come under this head, the action must be brought by the original payee or his executor or administrator. But under this statute the holder of such a note may bring an action thereon in the name of the payee or his executor or administrator, with their assent, and that such assent may be implied.⁸ But it would seem that, if the note is given for the use of the payee, or of the indorser of the maker, such a right cannot be implied in favor of the indorsee of the first indorsee;⁹ and where such a note was made payable to the maker's own order, and was signed and indorsed by him in blank, the signing was witnessed but the indorsement was not, it was held not to be a witnessed note within the saving of the statute.¹⁰ Where a witnessed note is sold by an assignee in bankruptcy, the purchaser may maintain an action in the name of the payee or his executor or administrator, the law implying the requisite assent.¹¹

¹ Appendix, Vermont.

² Appendix, Massachusetts.

³ Appendix, New York.

⁴ Appendix, Michigan.

⁵ Appendix, Arkansas.

⁶ Appendix, Iowa.

⁷ Maine, Massachusetts, and Wisconsin.

⁸ *Rockwood v. Brown*, 1 Gray (Mass.), 261. But an action cannot be brought in the name of an indorsee against the consent of the payee, nor can an indorsee of the original indorsee bring an action thereon in the name of such indorsee even with his consent, so as to save the statute. The authority must be derived from the payee or his executor or administrator.

Therefore where a witnessed note was given to a creditor payable at a bank, and the bank subsequently sold it to a third person who kept it for fifteen years and then brought an action upon it in the name of the bank, by and with its consent, against the maker's executors, it was held that the note was barred by the six years' clause. *Village Bank v. Arnold*, 4 Met. (Mass.) 587; *Fay v. Barker*, 4 Pick. (Mass.) 384. In Maine an assignee may sue in his own name. *Quimby v. Buzzle*, 17 Me. 470.

⁹ *Houghton v. Mann*, 4 Met. (Mass.) 587.

¹⁰ *Kinsman v. Wright*, 4 Met. (Mass.) 219.

¹¹ *Drury v. Vanuevar*, 5 Cush. (Mass.)

A note, in order to amount to a witnessed note within the meaning of the statute, must be attested by a person who at that time was legally competent to testify to the fact in court;¹ and under this rule, where a note was attested by the wife of the payee, who at that time was not a competent witness for or against her husband, but who by statute was made competent before the action was tried, it was held that the note was not a witnessed note within the meaning of the statute.² So, too, the witness must have signed it as such with the maker's assent, and as a part of the same transaction, and must either have seen it signed by him,³ or subsequently have signed it as witness at the maker's request.⁴ The fact that a person saw the maker sign a note does not warrant him in signing the note as witness at another time when the maker is not present, and without his knowledge or assent, and a note so attested is not a witnessed note within the meaning of the statute.⁵

The attestation of the signature of one maker of a note, which is subsequently signed by another person as maker, whose signature is not attested, does not make the note a witnessed note as to the last maker, but only as to the first.⁶ In order to bring the note within this statute as to all the makers, it must have been signed by him as witness in presence of all the makers.⁷ A payment upon a witnessed note within twenty years from its date, renews it for twenty years from the date of the payment;⁸ except in Vermont, where the statute runs in fourteen years.

No particular form is requisite to make a witnessed note, nor is it necessary that any words indicating the capacity in which the witness signs the note should be written there.⁹ But the fact that his name was placed there as witness may be shown by proof *aliunde*. Thus, where a person put his name upon a note as witness just below the body of the note, and directly above the date, it was held to apply to

442; *Pitt v. Holmes*, 10 Cush. (Mass.) 92; *Pritchard v. Chandler*, 1 Curtis (U.S.C.C.), 448; and the same rule seems to apply to any *bona fide* purchaser. *Rockwood v. Brown*, *ante*. The holder of a note payable to a certain person or bearer may bring an action thereon in the name of the executor, &c., of the payee, with the consent of such executor, &c. *Sigourney v. Severy*, 4 Cush. (Mass.) 176.

¹ *Jenkins v. Dawes*, 115 Mass. 599.

² *Jenkins v. Dawes*, *ante*.

³ *Smith v. Dunham*, 8 Pick. (Mass.) 249; *Lampson v. Fisher*, 128 Mass. 559. The question as to whether a note was signed at the maker's request and is a part of the same transaction is for the jury. *Id.*; *Lapham v. Briggs*, 25 Vt. 26.

⁴ *Swazey v. Allen*, 115 Mass. 594; *Boody v. Lunt*, 19 Me.

⁵ *Smith v. Dunham*, *ante*; *Trustees, &c. v. Rowell*, 49 Me. 330.

⁶ *Walker v. Warfield*, 6 Met. (Mass.) 466. In *Stone v. Nichols*, 20 Me. 49, a note was signed by the maker in the presence of a witness, and duly attested, and subsequently it was signed on the back by another person, but not in the presence of the witness, but in pursuance of an original agreement to that effect, and it was held not a witnessed note as to the latter.

⁷ *Lapham v. Briggs*, 27 Vt. 26.

⁸ *Estes v. Blake*, 30 Me. 164; *Howe v. Saunders*, 38 id. 350; *Lincoln v. Newhall*, 38 id. 179.

⁹ *Faulkner v. Jones*, 16 Mass. 269.

the whole note if shown to have been placed there for that purpose after the note was completed.¹ An indorsement written upon a note acknowledging it to be due, signed by the maker, and witnessed, does not amount to a witnessed note;² but a memorandum thereon as follows: "For value received I hereby acknowledge this note to be due, and promise to pay the same on demand;"³ or, "I hereby renew the within note," witnessed, have been held to amount to witnessed notes.⁴ An instrument as follows: "On demand with interest please pay J. S. or order fifty-five dollars," witnessed, has been held to come within the statute as a witnessed note.⁵

SEC. 140. **Checks.**—When a check is given upon a bank in which the drawer has no funds, and in which he had none during the ensuing six years, the statute of limitations begins to run from the time when the check was given;⁶ and in such cases no demand or presentment need be shown,⁷ and even though the want of funds is shown to have resulted from the fraudulent act of the maker, he is not thereby estopped from setting up the statute. The breach of contract is the cause of the action, even though there is fraud on the maker's part, and the contract is broken *instantly*, as in all cases where a check is drawn upon a bank where the maker has no funds it is due without presentment and demand.⁸ But where the drawer of the check has funds in the bank upon which it is drawn, the statute does not begin to run until it has been presented for payment and payment has been refused. Indeed, at law a check is treated as an inland bill of exchange; and, if

¹ Warren v. Chapman, 115 Mass. 584.

² Gray v. Bowden, 23 Pick. (Mass.) 282.

³ Commonwealth v. Whitney, 1 Met. (Mass.) 21.

⁴ Daggett v. Daggett, 124 Mass. 14.

⁵ Almy v. Winslow, 126 Mass. 342.

⁶ In Brush v. Barrett, 16 Hun (N. Y.), 409, the defendant gave a check upon a bank where he had no funds at the time or for more than six years thereafter. The check was not presented for payment until ten years after it was made. Held, that the statute of limitations began to run at the time the check was made, and an action thereon against the maker was barred after six years. The rule is well established that if the drawer has no funds in the hands of the drawee an action can be maintained against the former without presentment or notice of non-payment. Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; Fitch v. Redding, 4 Sandf. (N. Y.) 130; Healy v. Gilman, 1 Bosw. (N. Y.) 235; Johnson v. Bank of North America, 5 Robt. (N. Y.) 554. The circumstance

that the want of funds was the result of the fraudulent act of the drawer would not estop him from setting up the defence of the statute. In such a case the check is due without presentment and demand. The breach of the contract is the cause of the action, and the statute begins to run from the time of such breach, even if there is fraud on the part of the defendant. East India Co. v. Paul, 7 Moo. P. C. C. 89; Battley v. Faulkner, 3 B. & Ald. 288; Whitehouse v. Fellows, 10 C. B. N. s. 765; Wilkinson v. Verity, L. R. 6 C. P. 206. Affidavit by Court of Appeals, Nov. 9, 1880.

⁷ Johnson v. Bank of North America, 5 Robt. (N. Y.) 554; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; Healy v. Gilman, 1 Bos. (N. Y.) 235; Fitch v. Redding, 4 Sandf. (N. Y.) 130.

⁸ Wilkinson v. Verity, L. R. 6 C. P. 206; East India Co. v. Paul, 7 Moo. P. C. C. 85; Whitehouse v. Fellowes, 10 C. B. N. s. 765; Battley v. Faulkner, 3 B. & Ald. 288.

a loan is made by means of a check, a cause of action does not arise against the debtor until the check is cashed. This rule was illustrated in an English case,¹ where, in an action for a loan made by a check for £45, June 14, 1861, the writ was not issued until June 21, 1867 and the defendant set up the statute of limitations. It appeared that the defendant paid the check into his bank on the day following June 15, and received credit for it. The defendant having omitted to indorse the check, though payable to order, it was returned to him for signature, and was not presented to the plaintiffs and paid by them till the 21st June, 1861. It was held by the Court of Common Pleas, as being too clear for argument, that the statute was not a bar. The question, according to KEATING, J., was, When could the plaintiff have first sued the defendant for money lent? And he was of the opinion that the plaintiff could not have done so till he had lent the money, which was when the check was cashed, on the 21st June.

Where a check is certified, or marked "good" by the bank on which it is drawn, the holder stands in the place of the original depositor as to the amount covered by it, and the statute does not begin to run against him until an actual demand has been made by him upon the bank for payment.² As stated in a New York case,³ a bank by certifying a check to be good creates a simple and unconditional obligation on its part to pay the same on demand, and demand may be made at any time suiting the convenience of the party entitled to payment, and no laches can be imputed to him because of delay.

If a bank upon which a check is drawn payable to a particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action to the bank to recover back the money from the person so obtaining it accrues immediately upon the payment of the money.⁴

¹ *Carden v. Bruce*, L. R. 3 C. P. 300.

² *Girard Bank v. Bank of Penn. Township*, 39 Penn. St. 92; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass), 532; *Bank of the Republic v. Baxter*, 31 Vt. 104.

³ *Willeys v. Phenix Bank*, 2 Duer (N. Y. Superior Ct.), 121.

⁴ *Leather Manufacturers' National Bank v. Merchants' Nat. Bank*, 128 U. S. 26; GRAY, J., in delivering the opinion of the court said: "Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to

receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment; and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run immediately upon the payment.

Thus, in the early case of *Bree v. Holbeck*, 2 Doug. 654, where an administrator received the amount of the mortgage money upon his assignment of a mortgage purporting to be made to the deceased,

but in fact a forgery, of which both parties were ignorant, it was held by Lord Mansfield and the Court of King's Bench, that the right of action to recover back from the administrator the money so paid was barred by the statute of limitations in six years from the time of the payment.

So, in *Utica Bank v. Van Gieson*, 18 Johns. 485, where a promissory note payable at the bank of Geneva was left by the indorsers with the Utica Bank for collection, and sent by it to the Bank of Geneva for that purpose, and the amount was afterwards paid by the Utica Bank to the indorsers upon the mistaken supposition that it had been paid to the Bank of Geneva by the maker, when in fact it had not, and it was not pretended that the Utica bank had been guilty of any negligence, the Supreme Court of New York held that notice of the fact that the note had not been paid by the maker was unnecessary to maintain an action by the Utica bank to recover back the money from the indorsers; and CHIEF JUSTICE SPENCER said: "The plaintiff's ground of action, then, is that the money was paid to the defendants under a mistake of facts. The defendants are not bailees or trustees of the money thus received. It was paid and received as their money, and not as money to be kept for the plaintiffs. In such case it was not necessary to make a demand prior to the suit; for a request was not essential to the maintenance of the action; nor did the defendants' duty to return the money erroneously paid arise upon request."

In *Bank of United States v. Daniel*, 12 Pet. 32, the acceptor and indorsers, upon taking up a bill of exchange for \$10,000, which had been duly protested for non-payment, paid ten per cent as damages, under a mistake as to the local law upon the subject. Upon a bill in equity to relieve against the mistake, and recover back the money, this court, while holding that such a mistake gave no ground for relief, also held that, if it did, the statute of limitations ran, in equity as well as at law, from the time of the payment, saying: "If the \$1,000 claimed as damages were paid to the bank at the time the bill of exchange was taken up, then the cause

of action to recover the money (had it been well founded) accrued at the time the mistaken payment was made, which could have been rectified in equity, or the money recovered back by a suit at law."

In *Dill v. Wareham*, 7 Met. 438, the Supreme Judicial Court of Massachusetts, speaking by CHIEF JUSTICE SHAW, held that a party receiving money in advance on a contract which he had no authority to make, and afterwards refused to fulfil, was liable to the other party in an action for money had and received, without averment or proof of any previous demand. And in *Sturgis v. Preston*, 134 Mass. 372, where land was sold for a certain sum by the square foot, and the purchaser, relying on the vendor's statement of the number of feet, made payment accordingly, and afterwards discovered that the number had been overstated, but disclaimed all charge of fraudulent concealment on the part of the vendor, it was held that the right of action to recover back the excess paid accrued immediately, without any previous demand, and was barred by the statute of limitations in six years from the date of the payment. See also *Earle v. Bickford*, 6 Allen, 549; *Blethen v. Lovering*, 58 Me. 437.

The judgment of the circuit court in the present case appears to have been based upon the decision in *Merchants' National Bank v. First National Bank*, 4 Hughes, 9, which proceeds upon grounds inconsistent with the principles and authorities above stated, and cites no case except the very peculiar one of *Cowper v. Godmond*, 9 Bing. 748; s. c. 3 Moore & S. 219; in which the right of action to recover back money paid for a grant of an annuity, the memorial of which was defective, was held not to accrue until the grantor elected to avoid it on that ground, the annuity apparently being considered as not absolutely void, but as voidable only at the election of the grantor. See *Churchill v. Bertrand*, 3 Q. B. N. s. 568; s. c. 2 Gale & D. 548.

Although some of the opinions of the Court of Appeals of New York, in the cases cited at the bar, contain dicta which, taken by themselves and without regard to the facts before the court, might seem to support the position of the defendant

in error, yet the judgments in those cases, upon full examination, appear to be quite in accord with the views which we have expressed.

The cases of *Thomson v. Bank of British North America*, 82 N. Y. 1, and *Bank of British North America v. Merchants' National Bank*, 91 N. Y. 106, were actions by depositors against their respective bankers, and were therefore held not to be barred until six years after demand.

In *Southwick v. First National Bank*, 84 N. Y. 420, the decision was that there was no such mistake as entitled the party paying the money to reclaim it; and in *Sharkey v. Mansfield*, 90 N. Y. 227, it was adjudged that money paid by mistake, but received with full knowledge of all the facts, might be recovered back without previous demand; and what was said in either opinion as to the necessity of a demand where both parties act under mistake was *obiter dictum*.

Two other cases in that court were decided together, and on the same day as *Bank of British North America v. Merchants' National Bank*, above cited.

In one of them, the defendants, who had innocently sold to the plaintiffs a forged note as genuine, and, upon being informed of the forgery and requested to pay back the purchase-money, had expressly promised to do so if the plaintiffs should be obliged to pay a third person to whom they had in turn sold the note, were therefore held not to be discharged from their liability to refund by the plaintiffs having awaited the determination of a suit by that person against themselves, before returning the note to the defendants. *Frank v. Lanier*, 91 N. Y. 112.

In the other case, a bank which had paid a check upon a forged indorsement, supposed by both parties to be genuine, was held entitled to recover back the money, with interest from the time of payment, — necessarily implying that the right of action accrued at that time. *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74.

In the case at bar, as in the case last cited, the plaintiff's right of action did not depend upon any express promise by the defendant after the discovery of the

mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date.

A person who presents forged paper to a bank and procures the payment of the amount thereof to him, even though he makes no express warranty, yet, in law, he is treated as representing that the paper is genuine, and even though the payment is made to him in ignorance of the forgery, he is liable to an action to recover back the money which in equity and good conscience has never ceased to be the property of the payer. Under these circumstances there is never, at any stage of the transaction, any consideration for the payment, and the statute of limitations begins to run immediately upon the payment. A right of action under such circumstances does not depend upon any express promise of the defendant after the discovery of the mistake, or upon any demand by the plaintiff, but accrues at the date of the payment.

In *Bank of British N. America v. Merchants', &c. Bank*, 91 N. Y. 106, the plaintiff bank in March, 1870, was a depositor with defendant bank. On the 9th of that month it drew a check on defendant for \$17,500, which was less than its then deposit, payable to the order of one H. That check was on the same day certified to be good by defendant; at whose request did not appear. On the next day the check with the forged indorsement of H. was presented by some person other than H. to defendant, and paid by it, and the payment charged to plaintiff. On the 17th of said month a pass-book, wherein were the credits to and charges against the plaintiff, was returned by defendant to plaintiff in the usual course of business with the checks paid by defendant. It contained the charge of \$17,500, and the check as a voucher was also returned to plaintiff. The deposit account has always continued between the parties, and still exists. Plaintiff had no knowledge that

the indorsement of H. had been forged until the 24th of January, 1877, and thereafter, on the 26th of May, 1877, it notified defendant thereof, and still later further notified defendant that suit had been brought against plaintiff for the recovery of the amount of the check, and on the 20th of June, 1877, demanded from the defendant repayment of the amount of the check, tendering back the check, and payment having been refused, commenced this action Nov. 7, 1877. It was held that the defence of the statute of limitations was not available to the defendant. The defendant was a debtor to the plaintiff for all the moneys deposited with it by the plaintiff, and that the debt on account of the moneys so deposited did not become due until demand was actually made, and that a depositor has no cause of action for

such debt until after actual demand. It was also held that the certification did not make the check due without demand. A certified check cannot be sued upon without demand. The mere drawing of the check was not demand. It only authorized H., or some person in the behalf of H., to make the demand, and this was never done. The payment of the check by the defendant discharged no part of its indebtedness to plaintiff, and the latter lost none of its rights by receiving under a mistake as to the facts, the check as properly paid and charged to its account. The loss as between the defendant and the plaintiff as to a wrongful payment must fall on the defendant. *Weisser v. Denuison*, 10 N. Y. 68; *Howell v. Adams*, 68 id. 314; *Walsh v. German Am. Bk.*, 73 id. 424; *Thompson v. Bank of Brit. N. Amer.*, 83 id. 1.

CHAPTER XIII.

MISCELLANEOUS CAUSES OF ACTION.

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| <p>SEC. 141. Contracts, Express and Implied.</p> <p>142. Deposits, Certificates of Deposits, &c.</p> <p>143. Forged or Invalid Instruments.</p> <p>144. Implied Warranty.</p> <p>145. Sureties, Indorsers, &c.</p> <p>146. Contract of Indemnity, Guaranties, &c.</p> <p>147. Money paid for Another.</p> <p>148. Action under Enabling Acts.</p> <p>149. Actions against Stockholders of Corporations.</p> <p>150. Stock Subscriptions.</p> <p>151. Money payable by Instalments.</p> <p>152. Over-payments. Money paid by Mistake.</p> <p>153. Failure of Consideration.</p> <p>154. Sheriffs, Actions against, for Breach of Duty.</p> <p>155. Fraudulent Representations in Sales of Property.</p> <p>156. When Leave of Court to sue is necessary. Effect of, on Commencement of Limitation.</p> | <p>SEC. 157. Orders of Court.</p> <p>158. Property obtained by Fraud.</p> <p>159. Promise to marry.</p> <p>160. Contracts void under Statute of Frauds, Actions for Money paid under.</p> <p>161. Against Heirs, when Tenancy by Curtesy or Dower exists.</p> <p>162. Actions against Sureties on Administrator's Bonds, &c.</p> <p>163. Actions against Guardians, by Wards.</p> <p>164. Assessments, Taxes, &c.</p> <p>165. Agreement to pay Incumbrances.</p> <p>166. General Provisions.</p> <p>167. For Advances upon Property.</p> <p>168. Usurious Interest.</p> <p>169. Between Tenants in Common of Property.</p> <p>170. When the Law gives a Lien for Property sold.</p> <p>171. Co-purchasers, Co-Sureties, &c.</p> |
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SEC. 141. Contracts, Express and Implied. — Upon contracts of all classes, whether written or verbal, the statute begins to run from the time when a right of action accrues.¹ Thus, where goods or property

¹ *Baxter v. Gay*, 14 Conn. 119; *Tisdale v. Mitchell*, 15 Tex. 480; *Jones v. Lewis*, 11 id. 359; *Sprague v. Sprague*, 30 Vt. 488; *Rahsuhl v. Lusk*, 35 Mo. 316; *Justice, &c. v. Orr*, 12 Ga. 137; *Clarke v. Jenkins*, 3 Rich. (S. C.) Eq. 318; *Hayes v. Goodwin*, 4 Met. (Ky.) 80; *Guignard v. Parr*, 4 Rich. (S. C.) 184; *Sims v. Goudelack*, 6 id. 100; *Payne v. Gardner*, 29 N. Y. 146; *Hikes v. Crawford*, 3 Bush (Ky.), 19; *Pittsburgh, &c. R. R. Co. v. Plummer*, 37 Penn. St. 418; *Taggart v. Western, &c. R. R. Co.*, 24 Md. 568; *Davies v. Cram*, 4 Sanf. (N. Y.) 355; *Daniel v. Whitfield*, Busb. (N. C.) L. 294; *Berry v. Doremus*, 30 N. J. L. 399; *Waul v. Kirkman*, 25 Miss. 609; *Payne v. Slate*,

39 Barb. (N. Y.) 634; *Turner v. Martin*, 4 Robt. (N. Y. Superior Ct.) 661; *Peck v. New York, &c. Steamboat Co.*, 5 Bosw. (N. Y. Superior Ct.) 226; *Murray v. Coster*, 20 Johns. (N. Y.) 576. In *Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188, where plans of a church were completed more than five years before suit brought, but the architect furnishing them continued to superintend the work until within five years of bringing the suit, when he was discharged, it was held that the statute did not begin to run until the architect was discharged, and that a suit brought within five years of that time was in season to save the debt from the statute.

In *Clark v. L. S. & M. S. R'y Co.*, 94

of any description are sold, and no time is fixed for payment, the law implies a promise to pay when the purchase is made; and the plaintiff cannot, by showing a custom on his part to give one year's credit, prevent the running of the statute from the day of sale.¹ Where the terms of a contract are express, and the time of payment is agreed upon, of course the statute begins to run from that time, unless the time has been extended by the agreement of the parties; and when a contract has been made, and the time of payment has been fixed, and more property is delivered than was to be delivered under the contract, or more or extra work is done, and no contract is made as to the time of payment for the extra goods or extra work, the statute begins to run as soon as the goods are delivered or the extra work is completed. Thus, when a contract was entered into to build a ship at an agreed price, and afterwards the ship was built larger, but without any further

N. Y. 217, it was held that the provision of the code exempting from the operation of the statute limiting the time for the commencement of actions, a case where a person was entitled to commence an action when the code took effect, and declaring that in such a case, "the provisions of law applicable thereto immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof," does not refer simply to statutory provisions, but within the meaning of said exception a rule or doctrine established by judicial decision is a "provision of law" equally with one enacted by the legislature.

Accordingly held, where the plaintiff was entitled to, and had commenced his action before the code went into effect, that the provision of the code, making the statute of limitations of the place of residence of a non-resident defendant available as a defence in certain cases, did not apply; but that the case was governed by the rule in force when the code went into effect, *i. e.*, that the statute of limitations of a foreign State constituted no defence in an action brought here.

¹ *Brent v. Cook*, 12 B. Mon. (Ky.) 267. In *Hursh v. North*, 40 Penn. St. 241, evidence of a custom of the plaintiff to give a credit of six months was held not admissible for the purpose of proving that the price was not to be paid when the goods were sold, but on a certain date thereafter, so as to avoid the statute by showing that the bill was not due until within the statutory period.

In *Roberts v. Ely*, 113 N. Y. 128, the plaintiff brought an action, in 1881, to recover a specific portion of certain insurance money collected by E., the defendant's testator, in 1872, of which portion the plaintiff claimed he was the equitable owner. It was held that the alleged cause of action was a liability implied by law, which arose when the money was received by E.; that it was subject to the six years' statute of limitations then in force, and so was barred.

Money in the hands of one person, to which another is equitably entitled, may be recovered by the latter in a common law action for money had and received, subject to the restriction that the mode of trial and the relief which can be given in a legal action is adapted to the exigencies of the case, and is capable of adjustment in such an action, without prejudice to the interests of other parties. No privity of contract is required to sustain such an action, except that which results from the circumstances; and it is immaterial whether defendant's original possession was right-ful or wrongful.

The fact that the relation between the parties has a trust character does not, *ipso facto*, in all cases, exclude the jurisdiction of a court of law. It seems that if an equitable action could have, and had, been brought to enforce the alleged liability, it would still have been subject to the legal limitation of six years.

agreement as to the time of payment for the extra labor, it was held that the statute began to run as soon as the work was completed.¹ Where a term of credit is agreed upon, of course the statute does not begin to run until the time of credit has expired,² and in this class of contracts little or no difficulty in determining the time when the statute begins to run exists. The only difficulty arises with that class of contracts where the time for payment is not fixed, but is left to legal inference. In a contract for services, if the work is done under a continuous contract, and no time for payment is fixed, a right of action does not accrue until the work is completed;³ but although the work is continuous, yet if it is done under distinct contracts, a right of action accrues under each contract, and the statute begins to run from the time when it is completed.⁴

¹ *Peck v. New York & Liverpool Steamship Co.*, 5 Bosw. (N. Y.) 226.

² *Tisdale v. Mitchell*, 12 Tex. 68; *Bush v. Bush*, 9 Penn. St. 260.

³ *Eliot v. Lawton*, 7 Allen (Mass.), 274. In *Litter v. Smiley*, 9 Ind. 116, where in an action for work done for the plaintiff's intestate no time for payment was specified, and no time of service was agreed on, it was held that the statute did not begin to run as to any of the work until the work was fully completed, although it extended through a series of years. But in *Davis v. Gorton*, 16 N. Y. 255, where a person entered into the defendant's employment at a fixed salary, but for no definite time, and no time for payment was agreed on, it was held to be a general hiring from year to year, the pay for each year's service becoming due at the end thereof, so that the statute began to run on each year's wages from the end of each year. *McLaughlin v. Maund*, 55 Ga. 689; *Pursell v. Fry*, 19 Hun (N. Y.), 595.

⁴ *Davis v. Gorton*, *ante*.

In *Decker v. Decker*, 108 N. Y. 128, it appeared that D. entered into an agreement with the plaintiff, his wife, to pay her a stipulated annuity for her support and maintenance, and gave his bond and a mortgage on certain real estate as security. Subsequently, for the purpose of defrauding the plaintiff, D. caused the mortgaged property to be sold on execution issued on a prior judgment and bid off by one J., under an arrangement that the latter should advance the purchase-money and hold the property for the benefit of D., who subsequently repaid the purchase-

money. J. sold part of the land so purchased and received a mortgage for a portion of the purchase price. This, by the direction of D., he assigned, without consideration, to defendant H., who had knowledge of the fraud, and also deeded to her the balance of the property. Plaintiff obtained several judgments against D. for instalments of annuity not paid, and, after returns of executions issued thereon unsatisfied, brought this action in the nature of a creditor's bill to reach the property so transferred to H. Held, that a judgment was proper, adjudging plaintiff's mortgage to be a lien on the premises so conveyed to H., and directing a foreclosure sale; also, directing a judgment against H. for any deficiency not exceeding the amount of the bond and mortgage so assigned to her.

It was claimed, on appeal, that the representatives of J., who died before the commencement of the action, should have been made parties. Held, that if there was a defect of parties, the objection should have been taken by demurrer or answer, and, not having been so taken, was waived. The statute of limitations was pleaded as a defence. It was claimed by the defendants that the purchase by J. left a resulting trust in favor of the creditors of D.; that this action was, in substance, one for the enforcement of the trust, and so was barred by the ten years' limitation. Held, untenable; that no trust resulted, as the purchase by J. was on his own credit, and the transaction could only be assailed on the ground of fraud, and could only be barred by the lapse of six years after discovery of the fraud.

The statute begins to run upon a claim for the taking of usurious interest from the time when such interest is paid.¹ And each payment of usury furnishes a distinct cause of action against which the statute immediately commences to run.²

In Louisiana, it is held that the statute does not run against the debt secured by a pledge as long as the creditor has possession of the pledge. The definition of it being treated as a constant recognition of the debt, a remuneration or prescription which prevents the statute from beginning to run.³

SEC. 142. *Deposits, Certificates of Deposits, &c.* — In England a general deposit in a bank is treated as a loan, and the statute begins to run *instantly*; ⁴ but in this country it has been held that an action cannot be maintained for such a deposit without an actual demand; ⁵ and from these cases it follows that, as a right of action does not accrue until there has been a demand, the statute of limitations does not begin to run until a demand or something equivalent thereto has been made.⁶ If a special deposit is made, payable at a specific time, or upon notice of a certain duration, of course the statute does not begin to run until the time has expired or the notice been given and expired. Thus, in a Massachusetts case,⁷ it was held that where a balance was struck monthly on a savings-bank book of a depositor the statute began to run from the time the balance was struck. Where money or property is deposited with a bank or individual to be paid or returned upon demand, it is not payable or returnable, so that an action will lie therefor, until a demand has first been made therefor, consequently the statute does not begin to run until after demand; ⁸ so where money is deposited with an individual who is to pay interest entered thereon, with an agreement that it is not to be withdrawn except by draft at thirty days after sight, the statute does not begin to run, nor does the presumption of payment arise until a draft therefor has been presented and dishonored. Thus, in a New York case,⁹ a person deposited with the defendant, a private individual and not a banker, \$4,000 upon the terms stated. The deposit was made by means

¹ Rahway National Bank v. Carpenter, 52 N. J. L. 161.

² Albany v. Abbott, 61 N. H. 157; Barker v. Strafford Co. Savings Bank, 61 N. H. 147.

³ Citizens' Bank v. Hyams, 42 La. An. 729.

⁴ Pott v. Clegg, 16 M. & W. 321. In Wright v. Paine, 62 Ala. 340, where money was deposited with an individual under a writing by which the depositary acknowledges the receipt of a certain number of dollars in gold, "on deposit to be paid" to the depositor "on demand," it was held that, in the absence of any evidence of extrinsic facts to aid its construction, it would be treated as a loan rather than a bailment, and therefore became due and

payable, and the statute began to run thereon from its date.

⁵ Johnson v. Farmers' Bank, 1 Harr. (Del.) 117; Watson v. Phoenix Bank, 8 Met. (Mass.) 217; Downes v. Phenix Bank, 6 Hill (S. C.), 297.

⁶ In Buckner v. Patterson, Litt. Sel. Cas. (Ky.) 234, it was held that when money is deposited with a person for the use of another, the statute begins to run from the date of the deposit.

⁷ Union Bank v. Knapp, 3 Pick. (Mass.) 96; Sullivan v. Fosdick, 10 Hun (N. Y.), 173.

⁸ Finkbone's Appeal, 86 Penn. St. 368.

⁹ Sullivan v. Fosdick, 10 Hun (N. Y.), 173.

of two drafts, which were realized the last of February, 1853. The person making the deposit died in Hayti, of which country he was a resident, in 1856 or 1857, having left the whole of his property, including this money, to one Rosmonde Gaveau, and this will was duly proved in Hayti in 1875, and later in New York in November, 1875, and the plaintiff was appointed administrator *cum testamento annexo*. The defendant set up, 1st, the statute of limitations in bar of the claim; and, 2d, presumption of payment. But the court held, upon the authority of a previous case,¹ that a demand was necessary before the statute was put in motion. "In this case," said DAVIS, P. J., "A demand was required by the express agreement between the parties, and the previous form of demand was specified by the agreement to be a draft at thirty or sixty days' sight. In such a case we see no reason to doubt that the defendant's testator could have protected himself against any action brought by the plaintiff's testator at any time prior to such demand. In respect to the presumption that such a demand had been made, so that the statute had commenced to run long enough before the beginning of this action to bar the recovery, it may be suggested that it does not appear in the case that any person was authorized to make the demand from the time of the testator's death until the probate of the will before the courts of Hayti in 1875. Upon such a state of facts it is very questionable whether the presumption of a demand has any ground to stand upon, notwithstanding the great lapse of time since the deposit of the money."

Where money is deposited with one man for the use of another, it is held that a cause of action accrues to the person for whose use it was deposited, from the time of deposit, unless a time within which it is to be paid is fixed upon; but this would seem to depend upon the nature of the contract to be implied from the circumstances of the case. If the money was left with the third person at the request of the person for whom it was intended, the rule stated above would doubtless be correct; but, if not, the period from which the statute would run would seem to be, according to the cases, from the time when a demand was made for the money, unless the circumstances are such as to raise an implied promise on the part of the depository to seek the beneficiary and pay him the money at all events.² Where a certificate of deposit is issued, its terms may be decisive of the period when the statute attaches thereto. Thus where a certificate of deposit, in the following terms, was issued, —

CERTIFICATE OF DEPOSIT No. 20,186.

WASHINGTON COUNTY BANK, UNION VILLAGE, N. Y.,
April 4, 1863.

This certifies that J. K. Sanborn, agent of George Paige, has deposited in this bank five hundred dollars to the credit of said agent, payable on the return of this certificate, properly indorsed.

\$500.

EDWIN ANDREWS, *Cashier*.

¹ Payne v. Gardner, 29 N. Y. 146.

² Hutchings v. Gilman, 9 N. H.

³ Buckner v. Patterson, Litt. Sel. Cas. 359.
(Ky.) 234.

it was held that the statute did not begin to run thereon until a demand had been made for the money.¹ In this case the certificate was not transferred to the plaintiff until Oct. 20, 1870, more than seven years after its issue. The court held that the statute had not run thereon, because it did not attach to such instruments until a demand had been made therefor. "In the strict meaning of the word, borrowed from the civil law, 'deposit' is the delivery of a thing for custody, to be redelivered on demand, without compensation," said LARNED, P. J. "Such are deposits of securities or valuables in a bank, for safe-keeping. But ordinary money deposits in banks are clearly different in this respect: the identical money deposited is not to be returned, — only its equivalent; and the money deposited becomes the money of the bank. The bank really becomes debtor to the depositor. Still, however, the bank is, in theory, supposed to have the money on hand, ready to deliver when called for; and hence it is that, as in the case of a true deposit, an actual demand must be made before the bank can be required to pay. This is the plain and undoubted understanding of all parties. The depositor puts his money in the bank for better security, instead of keeping it himself. And when he actually demands it, the bank is to pay; not before. The bank may also give a certificate of deposit. When they do this, and when, as in this case, they make the certificate payable on its return, properly indorsed, they have then added to their original undertaking as a depositary an agreement that they will pay the deposit to the holder of that certificate, properly indorsed. They are, therefore, under a liability as depositary, to be ready to redeliver the money whenever demanded; and further, to deliver it to any holder of that certificate, properly indorsed. It follows, therefore, that they are liable to a *bona fide* holder of the certificate, notwithstanding a payment to the original depositor. It was urged by the defendants that the certificate was payable forthwith; that, after the lapse of an unreasonable time (in this case seven years), it was presumed to be dishonored, and therefore that the assignee took it subject to all equities. We think not. The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass-book, is intended to represent moneys actually left with the bank

¹ National Bank of Fort Edward v. Washington Co. Bank, 5 Hun (N. Y.), 605.

In Smiley v. Fry, 100 N. Y. 262, it was held that a firm, of which defendant is the surviving partner, in May, 1864, executed and delivered to the plaintiff's assignor, upon receipt of the sum specified therein, an instrument, the body of which is as follows: "Due S. K. Ashton, M. D., Trustee, \$4,000, returnable on demand. It is understood that this sum is specially

deposited with us, and is distinct from other transactions with said Ashton." In an action upon the same wherein the statute of limitations was set up as a defence, held, that it was in the nature of a certificate of deposit, not a promissory note; that no cause of action arose thereon until a demand was made for the sum deposited; and, as the jury found from evidence justifying the finding that no demand was made until 1880, that the action was not barred by the statute.

for safe-keeping, which are to be retained until the depositor actually demands them. Such a certificate is not dishonored until presented.”¹ But, where money is deposited in a bank from time to time, subject to check at sight, the relation between the parties is not that of trustee and cestui que trust, but of debtor and creditor. When received, in the absence of any express stipulation to the contrary, the money at once becomes the property of the bank, and the bank becomes the debtor of the depositor, under an implied contract to discharge the indebtedness by honoring the checks drawn thereon by the depositor,² and also to repay on the demand of the depositor any balance which may be due at the time of demand.³ But this rule does not apply where the thing deposited is a commodity, such as “Confederate notes,” and the agreement was that the collection should be made in like notes;⁴ nor does it apply to lands or other securities or packages of money deposited with it under a special contract that the same shall be returned.⁵ But, while

¹ Hamell v. Adams, 68 N. Y. 314; Payne v. Gardner, 29 N. Y. 167; Farmers’ & Mechanics’ Bank v. Butchers’ & Drovers’ Bank, 14 N. Y. 627. Such also is the rule in Indiana. Brown v. McElroy, 52 Ind. 404. But in Georgia, in Meadow v. Dollar Savings Bank, 56 Ga. 605, it was held that a certificate of deposit payable to the order of the depositor, but containing no other indication of the time of payment than was to be derived from the words, “with interest at the rate of seven per cent on call and ten per cent” per annum is payable on demand, and therefore due immediately. So also in Illinois. Brahm v. Adkins, 77 Ill. 263; Adams v. Orange Co. Bank, 17 Wend. (N. Y.) 514; Girard Bank v. Bank of Penn Township, 39 Penn. St. 92; Brummagin v. Tallant, 29 Cal. 503. And a certificate of deposit payable “on return of this certificate” is payable on demand. Tripp v. Curtenius, 36 Mich. 494. The demand need not be made by the depositor in person. Bank of Kentucky v. Wister, 2 Pet. (U. S.) 318. A demand is not necessary after the bank has rendered an account claiming it as paid. Bank of Missouri v. Benoist, 10 Mo. 519. And consequently the statute would run from the time when by its acts the bank had rendered a demand unnecessary (probably), or when it has given the depositor notice that his claim will not be paid. Farmers’ Bank v. Planters’ Bank, 10 G. & J. (Md.) 422.

² Bank of the Republic v. Mills, 10 Wall. (U. S.) 152; Buchanan & Co. v. Woodman, 1 Hun (N. Y.), 639; Dawson v.

Real Estate Bank, 5 Ark. 283; Foster v. Essex Bank, 17 Mass. 479; Coffin v. Anderson, 4 Blackf. (Ind.) 395; Bank of Kentucky v. Wister, 2 Pet. (U. S.) 318; Albany Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94; Keene v. Collier, 1 Met. (Ky.) 415; Corbett v. Bank of Smyrna, 2 Harr. (Del.) 235; Matter of Franklin Bank, 1 Paige (N. Y.) Ch. 249; Graves v. Dudley, 20 N. Y. 74; Marsh v. Oneida Central Bank, 34 Barb. (N. Y.) 298; Lund v. Seaman’s Savings Bank, 37 id. 129; Wray v. Tuskege Ins. Co., 34 Ala. 58; Bank of Northern Liberties v. Jones, 42 Penn. St. 536; Downes v. Phenix Bank, 6 Hill (N. Y.), 297; Chapman v. White, 6 N. Y. 412; Ellis v. Linck, 3 Ohio St. 66. It is held that a bank, having without objection received the bills of other banks, without diminution or discount, notwithstanding that at the time of the deposit, or subsequently thereto, they were worth less than par, is liable to pay the par value therefor. Marine Bank of Chicago v. Chandler, 27 Ill. 525. The Bank of Kentucky v. Wister, *ante*, is a strong case upon this point.

³ Boyden v. Bank of Cape Fear, 65 N. C. 13. And this rule is applied between banks where one becomes a depository for another. Phelan v. Iron Mountain Bank, 16 Bankr. Reg. (U. S.) 308.

⁴ Planters’ Bank v. Union Bank, 16 Wall. (U. S.) 484; Ruffin v. Commissioners, &c., 69 N. C. 498; Litty v. Same, 69 id. 300.

⁵ Hall v. Rawallie, 8 Kan. 137; Smith v. First National Bank, 99 Mass. 605;

the bank becomes a debtor to the extent of the deposit, it is not liable to pay interest thereon in the absence of any contract to that effect.¹ Where money is paid into court, and is placed in the custody of the clerk or other officer designated by law to have the custody of it, the statute does not begin to run against the party mutually entitled thereto until a demand has been made for the money.² And the same rule has been applied where money has been paid to a commissioner in equity.³

Lancaster Co. National Bank v. Smith, 62 Penn. St. 47; Maury v. Coyle, 34 Md. 235.

¹ Parkersburgh National Bank v. Als, 5 W. Va. 50.

² In Lynch v. Jennings, 44 Ind. 276, an action was brought for the specific performance of a contract to convey certain lands. In his complaint A. alleged a tender and refusal of the purchase-money, and brought it into court, and it remained in the hands of the clerk. After years of litigation a final decree was entered in A.'s favor. The executors of B. then demanded the money of the administrators of the clerk, who had died, and on their refusal to pay brought an action for its recovery. The defendants set up the statute of limitations. The court held that the statute did not begin to run in such cases until a demand upon the defendants for the money.

³ Heriot v. McCauley, Riley (S. C.) Ch. 19.

In Viets v. Union Nat. Bank of Troy, 101 N. Y. 563, reversing 31 Hun, 484, the plaintiff at the request of B., deposited certain moneys belonging to the latter, with defendant; he made the deposit, however, in his own name, to the credit of a deposit account he then had with the defendant, and gave to B. two checks for the amount, which the latter on Feb. 22, 1869, indorsed and delivered to E., as part consideration for her promise to marry him. On the next day, proceedings *de lunatico inquirendo* were instituted against B., and an inquisition therein held March 10th, adjudging him to be of unsound mind and that he had been, for a period of six months. Pending the proceeding, an order was made enjoining the defendant from paying over the moneys to any one. On March 31st, an order was made confirming the inquisition and directing defendant to pay the said moneys to the committee hereby appointed, and April 15th defendant complied with the order. On March 6th, one of the checks

was presented to defendant for payment and refused. On March 8th, B. was married to E. The other check was presented and payment refused August 28, 1871. In an action to recover the amount so deposited, held, that as the money belonged to B., when deposited, although the deposit was in plaintiff's name, it still remained the property of B. and the payment to the committee was a legal payment which discharged defendant; that, assuming there was an equitable right in E. to the money, arising out of the antenuptial contract, such equity could not be invoked against the bank, it having no notice of the same when it made payment. If any such equitable claim existed, it could only be enforced in an action against the committee.

The committee so appointed brought an action against E. to set aside the marriage on the ground of the alleged lunacy of B. The trial resulted in a finding that, at the time of the marriage, B. was of sound mind and capable of entering into a marriage contract, and judgment was entered in favor of E. Held, that this did not affect the validity of the appointment of the committee or of the payment by defendant.

This action was brought in 1878. It was held that the right of action, if any existed, was barred by the statute of limitations; and this, although the defendant had, within six years, paid checks drawn by the plaintiff for the balance due him for moneys deposited on his own account, aside from the moneys in question.

While a check drawn by a depositor against a general bank account does not operate as an assignment of so much of the account, it authorizes the payee, or one to whom he has indorsed and delivered it, to make a demand, and a refusal of the bank to pay on presentation gives the drawer a right of action, in case he has funds in bank to meet the check and the refusal was without his authority.

SEC. 142 a. Money received by one for use of another. — Where money is received by one to and for the use of another, under such circumstances that it is the duty of the former to pay it over, an action for money had and received, may be brought to recover it without a demand, and the statute of limitations begins to run from the day of the receipt of the money. Thus, in a New York case,¹ T., the plaintiff's intestate, deeded certain lands to the defendant, and assigned to him a mortgage as security for indebtedness, with the understanding that the latter might sell the lands, collect the mortgage, and reimburse himself, by agreeing to re-convey on payment of the debt and expenses and all subsequent loans. During the life of T., who died in 1871, defendant sold all the lands and received the proceeds, except one item, which was received in 1872. In an action brought in 1881, for an accounting and payment over of any surplus, held, that the proceeds of the lands which came to defendant's hands after he had been fully reimbursed, were received by him to and for the use of T.; it was his duty at once to pay them over, and upon his failure to do so, he was liable without demand; that, therefore, the six years' statute of limitations applied, and the action was barred; that this result was not affected by the fact that an accounting was required, as whatever might be the form of the action the legal rule of limitations applied; also, as there was no unlawful interference by him with the estate of the intestate after his death, that defendant could not be held as executor *de son tort*.

A mortgagee who has received moneys, the proceeds of sale of the mortgaged property, is not trustee of an express trust; if in any sense a trustee, it is simply an implied trust, and, as to the liability growing out of such a trust, the ordinary rules of limitation apply.

SEC. 143. Money misappropriated. — When money is paid to a person for a special purpose, and is by him applied to another, the statute begins to run from the date of such misappropriation. Thus,

The presumption is that a third person presenting a check payable to the order of and indorsed by the payee has authority to present it, at least so far as the drawer is concerned.

The implied contract between a bank and its depositors is that it will pay the deposits when and in such sums as are demanded, the depositor having the election to make the whole payable at one time by demanding the whole, or in instalments by demanding portions; and whenever demand is made by presentation of a genuine check in the hands of a person entitled to receive the amount thereof, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises, and the statute of limi-

tations begins to run as against the instalment so made due and payable.

The provision of the code, excepting from the limitations, contained therein a case where a person who, at the time said code took effect, was entitled to commence an action or proceeding, and who commenced the same within two years thereafter, and making the provision of law previously in force, although then repealed, still applicable thereto, did not operate to extend the time for the bar of the statute of limitations to take effect; it merely left actions or proceedings brought within two years to be governed by the law in force when the code went into effect.

¹ *Mills v. Mills*, 115 N. Y. 80, reversing 48 Hun, 97.

in a New York case,¹ a county treasurer instead of applying taxes assessed on the property of a railroad corporation in a town, to the payment or redemption of bonds of the town, issued in aid of the construction of the road of such corporation, as required by the act of 1869, as amended in 1871, applied them in payment of county and State taxes, with, and as part of, other moneys raised by the town for those purposes, and it was held that an action, as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated; that the liability included as well the portion of the funds applied in payment of the State taxes as that applied for other county purposes; also, that the action was properly brought by the supervisor of the town in his name as its representative. The cause of action in such case arises when the misappropriation is made; the statute of limitations then begins to run against it, and an action brought more than six years thereafter is barred.

While every duty imposed upon a public officer is in the nature of a trust, persons injured by a violation of the duty for which they may maintain an action of law, must pursue that remedy within the period of limitation of legal actions; and the fact that the supervisors of the town for the period of fourteen years were apprised from year to year, while sitting as members of the board of supervisors of the county, of the misappropriation, and made no objection thereto, did not estop the town from claiming a repayment of the money.

A town cannot be estopped by the neglect of its supervisors to assert a claim against the county, the grounds of which are equally known to all the members of the board of supervisors. A county treasurer in the payment of State taxes to the State comptroller acts as agent for the county, and pays on its behalf.²

SEC. 143 *a*. **Forged or Invalid Instruments.** — Where a bank pays a draft or check drawn upon it, payable to the order of A., to an indorsee thereof, and it subsequently transpires that the indorsement thereon was forged, the statute of limitations does not run against its claim for indemnity against the indorsee until it has been notified by the drawer of his intention to insist on the defect of title and cancel the credit given it on the draft. Thus, in a case of the United States Court,³ it appeared that the United States Treasurer in 1867 made a draft on the First National Bank of B. payable to the order of O. The indorsement of O. was forged, and the check was sent by a third party to the M. bank for collection. The M. bank indorsed it and sent it to the drawee, by which it was paid and sent to the United States Treasury, where it was credited to the drawee. In 1877 the United States sued

¹ *Strough v. Supervisors*, 119 N. Y. 212; 50 Hun, 54.

² *Bridges v. Board of Supervisors*, 92 N. Y. 570, distinguished, so far as it relates to the liability of the county for the

portion of the fund applied in payment of State taxes.

³ *Merchants' National Bank of Baltimore v. First National Bank of Baltimore*, 3 Fed. Reporter.

the drawee for the amount of the draft, upon the ground that the indorsement was forged; of which suit the M. bank was notified, and employed counsel in defending the suit. Judgment was rendered against the drawee. In an action by the drawee commenced against the M. bank, after it had paid the judgment to the United States, the M. bank set up the statute of limitations. The court held that the action was not barred, as the statute did not begin to run at the time of the payment of the draft, nor until the United States elected to insist on the defect of title and cancel the credit given to the drawee on the draft. The court relied upon the authority of an English case¹ quite similar in principle. In that case the question was, whether a plea of the statute of limitations was a bar to an action for money had and received to recover the consideration money of a void annuity, when the annuity was granted more than six years before the action was brought, but was treated by the grantor as an existing annuity within that time. "That question," said the court, "depends upon another: At what time did the cause of action arise? The cause of action comprises two steps: the first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of the annuity. The cause of action was not complete until the last step was taken."²

SEC. 144. **Money had and received.** — Where an action is brought for money had and received by the defendant to his use, the statute only begins to run from the time when it was received by him. Thus, in a New York case,³ when a municipal corporation, acting through its officers, in the execution of a power conferred upon it to collect a tax assessed upon a particular citizen, enforces its collection out of the property of another, in nowise liable therefor, and appropriates the proceeds of collection to its own use, with full knowledge of the illegality of the proceedings, it becomes liable to the owner for the spoliation of his property. In an action to recover of the defendant the money received into its treasury through proceedings taken to collect a tax assessed upon the stockholders of a bank, doing business within its corporate limits, it appeared that the property levied upon and sold by the defendant was not the property of the stockholders, but of the bank. By the defendant's charter, its mayor is its executive head and clothed with the duty and power of supervision of it and its officers in all departments. Its treasurer and tax receiver are intrusted with the duty and power of collecting taxes and keeping the moneys for the defendant. The collector was directed, when he received the warrant from the treasurer and tax receiver, to go to the bank and levy upon everything in the bank, to make the levy and

¹ Cowper v. Godmond, 9 Bing. 788.

² See Ripley v. Withee, 27 Tex. 14, where it was held that an action for damages arising from the sale of a forged land-

warrant did not accrue until the certificate had been presented to the Court of Claims and rejected by it.

³ Teall v. Syracuse, 120 N. Y. 187.

sale of its property, and the mayor was so informed, and the treasurer received the tax from the collector, knowing that it was obtained by such levy and sale. It was held that the plaintiff was entitled to recover; that the proceedings of the defendant's officers in collecting the tax were unlawful; and that knowledge thereof was justly imputable to the defendant; and that the defendant's knowledge of the illegal levy and sale relieved the plaintiff from demanding the money before bringing this action; and that the action, being for money had and received, the statute of limitation did not begin to run until the defendant had received the money.

SEC. 144 a. Implied Warranty. — Where property is sold under such circumstances that the law will imply a warranty, the statute begins to run from the date of the warranty. Thus, where the payee of a negotiable note indorses the same, the law raises an implied warranty that the note was given for a valuable consideration, and upon this warranty an action for its breach accrues and the statute begins to run at once.¹ In the case of a contract for the mutual exchange of lands which contains nothing from which it can be inferred that one conveyance was to precede the other, the law implies that the conveyances are to be made concurrently, and that the mutual covenants of the parties are dependent, and that the statute does not begin to run thereon against the vendor until he has performed by giving a deed, nor against the purchaser until he has made a tender of the price.² Where a party transfers a note, knowing it to be affected by usury, to one who is ignorant of the fact, he instantly becomes liable to the purchaser for the deceit; but the statute only begins to run from the time the fraud was discovered.³ Upon an implied warranty of title to chattels sold, it has been held that the statute does not begin to run until the vendee has been disturbed in his title.⁴

SEC. 145. Sureties, Indorsers, &c. — Where a surety is compelled to pay a debt, the statute begins to run against his claim from the day of such payment, and not from the date of the original obligation,⁵ and this

¹ *Blithen v. Lovering*, 58 Me. 437.

² *Brennan v. Ford*, 46 Cal. 7.

³ *Persons v. Jones*, 12 Ga. 371.

⁴ *Gross v. Kierski*, 41 Cal. 111.

⁵ *Hammond v. Myers*, 30 Tex. 375; *Burton v. Rutherford*, 49 Mo. 255; *Reeves v. Pulliam*, 7 Bax. (Tenn.) 119; *Thayer v. Daniels*, 110 Mass. 345; *Barnsback v. Reiner*, 8 Minn. 59; *Walker v. Lathrop*, 6 Iowa, 516; *Thompson v. Stevens*, 2 N. & M. (S. C.) 493; *Scott v. Nichols*, 27 Miss. 94. In *Wesley Church v. Moore*, 10 Penn. St. 273, it was held that where the property of a surety was sold on an execution to pay the debt, the statute began to run from the date of the sale. *Ponder v. Car-*

ter, 12 Ired. (N. C.) L. 242; *Hale v. Andrews*, 6 Cal. (N. Y.) 225; *Garrett v. Garrett*, 27 Ala. 687; *Presslar v. Stallworth*, 37 id. 402; *Walker v. Lathrop*, 6 Clarke (Iowa), 516; *Bennett v. Cook*, 45 N. Y. 268; *Scott v. Nichols*, 27 Miss. 94. The law implies a promise on the part of the principal to reimburse the surety and the action is upon this implied promise. *Ward v. Henry*, 5 Conn. 596; *Powell v. Smith*, 8 Johns. (N. Y.) 249; *Hassinger v. Solms*, 5 S. & R. (Penn.) 8; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Bunce v. Bunce*, Kirby (Conn.), 137; *Hulett v. Loullard*, 26 Vt. 295; *Smith v. Hayward*, 5 Me. 504; *Lonsdale v. Cox*, 7 T. B. Mon.

is also the rule as to contribution against a co-surety.¹ No action,

(Ky.) 405; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Holmes v. Weed*, 19 Barb. (N. Y.) 128. It is not necessary that he should pay in money; it is sufficient if he pays in land or personal property. *Bonny v. Seely*, 2 Wend. (N. Y.) 481; *Randall v. Rich*, 11 Mass. 498; *Ainslee v. Wilson*, 7 Cai. (N. Y.) 662. But the implied promise is only to indemnify the surety; consequently it secures a discharge of the debt for less than its amount. He can recover no more than he paid; and, if he paid the debt in depreciated currency at par, he can only recover the amount which it was worth at the time of payment. *Owings v. Owings*, 3 J. J. Mar. (Ky.) 590; *Hall v. Creswell*, 12 G. & J. (Md.) 36; *Jordan v. Adams*, 7 Ark. 348; *Crozin v. Adams*, 4 J. J. Mar. (Ky.) 514. So he may sue at once if he has taken up the original note, and given his own in lieu of it, which has been accepted in payment. *Downer v. Baxter*, 30 Vt. 467; *Elwood v. Deifendorff*, 5 Barb. (N. Y.) 398. But in Indiana it is held that he can maintain no action until he has actually paid a note given in lieu of the original note, *Pitzer v. Harmon*, 8 Blackf. (Ind.) 112; *Romine v. Romine*, 59 Ind. 346; even though it was secured by mortgage, *Bennett v. Buchanan*, 3 Ind. 47. A demand is not necessary. The statute attaches at once upon payment. *Odin v. Greenleaf*, 3 N. H. 270; *Sikes v. Quick*, 7 Jones (N. C.) L. 19.

In a California case, *Stone v. Hammell*, 832 Cal. 547, *McFarland, J.*, in a well considered opinion, says: "The general rule is, undoubtedly, that a surety can recover of the principal only the amount or value which the surety has actually paid. If he

has paid in depreciated bank notes taken at par, he can recover only the actual value of the bank notes so paid and received. If he has paid in property, he can recover only the value of the property. If he has compromised, he can recover only what the compromise cost him. The rule is that he shall not be allowed to "speculate out of the principal." *Brandt*, Sur. Sec. 182, and cases there cited; *Estate of Hill*, 67 Cal. 243.

There is authority, however, and perhaps a preponderance of authority, to the point, that if a surety, by giving his negotiable promissory note, satisfies the claim of the creditor, and extinguishes the debt of the principal to the creditor, he may recover from the principal the amount of the debt without showing that he has paid his promissory note.

But the authorities are not uniform upon the subject. In Indiana and North Carolina, and some other States, it is held that the surety cannot recover of the principal until he has paid the money, and that the giving of a note is not sufficient. *Brisendine v. Martin*, 1 Ired. L. 286; *Nowland v. Martin*, id. 307; *Romine*, 59 Ind. 351, and cases there cited.

Many of the cases hold that, if the surety discharges the debt by a negotiable note, he cannot maintain an action against the principal, while, if he does so by means of a bond, or any non-negotiable instrument, he cannot, upon the theory that a negotiable note is analogous to money, — a distinction which is founded upon no apparent good reason. *Bulware v. Robinson*, 8 Tex. 327, 58 Am. Dec. 117; *Peters v. Barnhill*, 1 Hill, L. 327.

¹ *Singleton v. Townsend*, 45 Mo. 379; *Wood v. Leland*, 1 Met. (Mass.) 387; *Peters v. Barnhill*, 1 Hill (S. C.), 234; *Moxey v. Carter*, 10 Yerg. (Tenn.) 521; *Lowndes v. Pickney*, 1 Rich. (S. C.) Eq. 155; *Sherwood v. Dunbar*, 6 Cal. 53; *Knotts v. Butler*, 10 Rich. (S. C.) Eq. 143. An action for contribution arises at once upon the payment of the whole debt by one surety against his co-sureties for the proportion of the debt each should pay. *Whitman v. Gaddy*, 7 B. Mon. (Ky.) 591; *Paulin v. Kaighn*, 29 N. J. L. 480; *La-*

beaume v. Sweeney, 17 Mo. 153; *Samuel v. Zachary*, 4 Ired. (N. C.) L. 377; *Stallworth v. Pressler*, 34 Ala. 505; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Lee v. Forman*, 8 Met. (Ky.) 114; *Pinkeston v. Taliaferro*, 9 Ala. 547; *McDoual v. Magruder*, 3 Pet. (U. S.) 470; *Fletcher v. Jackson*, 23 Vt. 581; *Foster v. Johnson*, 5 id. 64; *Stout v. Vanse*, 1 Rob. (Va.) 169; *Cage v. Foster*, 5 Yerg. (Tenn.) 261. And he is not first bound to pursue the principal. *Caldwell v. Roberts*, 1 Dana (Ky.), 355.

however, can be maintained until the surety has actually paid the debt. The fact that a judgment has been rendered against him, and that he has been committed to jail upon an execution thereon, does not entitle

The rule is founded on the reason that if the surety, by giving his own obligation, discharges the original debt of the principal, the latter is as much benefited as if he had discharged it by actually paying the money. Its weakness lies in the possibility of the surety recovering the whole amount of the principal, and never paying his own note, thus violating the cardinal rule that the surety shall not speculate out of the principal. But, if we assume the rule to be as first above stated, it is not so clearly commendable as to deserve pushing further than adjudicated cases have already carried it; and in all cases to which our attention has been called the rule has been enforced against the principal in favor only of the surety who has extinguished the debt to the original creditor. We have seen no case in which the rule has been applied to a surety who had not satisfied the original debt, but had only given his note to another surety, who had satisfied it. Moreover the reason of the rule, if it be held to be the rule, is that the principal is benefited to the extent of the original debt or liability which has been extinguished by the new obligation of the surety; and the reason ceases when there is no such benefit. Now, in the case at bar, defendant was in no manner benefited by the notes given by plaintiff to Newell, nor was any debt or liability of defendant thereby extinguished, because, at the time the notes were given, there was no legal liability from the defendant to Newell, for the reason that any cause of action which the latter might have had against the defendant for moneys which he had paid to Byron Stevens had long been barred by the statute of limitations. The last payment made by Newell on the note to Stevens, as averred and found, was on Jan. 10, 1881; and, as his cause of action for the payments which he had made was not "founded on a written instrument," it was barred in two years, — that is on Jan. 10, 1883. *Chipman v. Morrill*, 20 Cal. 136.

But plaintiff did not give his notes to Newell until March 1, 1884. At that time defendant was under no legal obligation to any one which plaintiff could dis-

charge by giving said notes. The original note given to Stevens had itself been long since outlawed. Therefore, by giving said notes, plaintiff acquired no cause of action against the defendant herein.

We think, also, that the cause of action averred in the complaint would have been barred by the statute of limitations, which was pleaded by defendant, even though plaintiff, on March 1, 1884, had actually paid Newell the \$1,000 in money. Plaintiff seeks to avoid the running of the statute through the fact that, within a month after the original note to Stevens matured, he left the State, and resided out of the State for several years. His contention is that, as Newell's cause of action against him for contribution would not be barred while he remained out of the State, therefore his cause of action which he had against defendant, or which he proposed at some future time to have, by paying his contributive share to Newell, would not be barred during his absence from the State, though such absence should be for 50 years. He contends that by returning at any time, and subjecting himself to Newell's claim, and paying it, he could recover his part of it against defendant, although in the hands of Newell it had been outlawed for a quarter of a century. We do not think that the law of limitation of actions contemplates any such an anomaly. When a man leaves the State, the statute of limitations does not run during his absence as to any cause of action against him, but his absence does not prevent the statute from running as to any cause of action in his favor. At any time within two years after Newell had paid the original note, plaintiff could have paid his contributive share to Newell, and maintained an action for it against defendant. But he could not wait until the whole of Newell's cause of action against defendant was barred, and then revive one half of the claim by coming back years afterwards, and making a real or pretended payment of it to Newell. The whole claim was, as to defendant, dead, and the breath of life could not be blown into one-half of it by any such legal hocus-pocus.

him to an action against the principal for money paid, &c.¹ Where money is paid by one person for another, and no time is fixed for payment, the statute attaches from the date of its payment.² The statute begins to run against the right of sureties to be subrogated to the payee's right to securities, &c., from the time of payment of the debt by them.³ So strict is this rule and so rigidly is it adhered to that, even when a surety procures an extension of time from the holder, and gives collateral security, and ultimately pays the debt, it is held that the statute does not begin to run against him until he has actually paid the debt.⁴ The rule may be said to be that so long as any liability on the maker's part upon the original debt remains the surety has no right of action against him, and consequently the statute does not begin to run against him; but, although the surety may not have paid the debt in money, yet if he has in any manner assumed the debt, so that the maker's liability upon it is at an end, from that time the statute begins to run against the surety.⁵ If the note or obligation is payable by instalments, the statute begins to run against the surety from the time when each instalment was paid by him.⁶ But if the note is not so payable, and the surety in fact pays the note by instalments, the statute does not begin to run from the date of each payment, but from the date of the last payment made by him, in liquidation of the note.⁷ When two persons execute to each other written instruments in the form of deeds, which are defective as conveyances for the want of attestation or acknowledgment, each instrument being the consideration of the other, and possession is given and taken by each, the statute at once commences to run, and, after the lapse of the statutory period, perfect a title which will maintain or defeat an action of ejectment.⁸

Where a mortgage is given by the maker of a note to a person who becomes surety thereon, conditioned that if the maker pays the note and saves the surety harmless from all demands upon it the conveyance should be void, the statute does not begin to run against the mortgagee until he has actually paid the note or some part of it, and the note is discharged.⁹ The same rule prevails as to indorsers. The statute

¹ *Rodman v. Hedden*, 10 Wend. (N. Y.) 500.

² *Bowman v. Wright*, 7 Bush (Ky.), 375.

³ *Bennett v. Cobb*, 45 N. Y. 268.

⁴ *Norton v. Hall*, 41 Vt. 471.

⁵ *Hitt v. Shorer*, 34 Ill. 9.

⁶ *Bullock v. Campbell*, 9 G. & J. (Md.) 182.

⁷ *Barnsback v. Reiner*, 8 Minn. 59.

⁸ *Hall v. Caperton*, 87 Ala. 285.

⁹ *M'Lean v. Ragsdale*, 31 Miss. 701.

In *Schoener v. Lissauer*, 107 N. Y. 111, it was held that the provision of the code, applying a six years' limitation to actions "to procure a judgment other than for a

sum of money on the ground of fraud, in a case," formerly "cognizable by the Court of Chancery," does not apply to an action by the owner of the fee to remove a cloud upon title to land, by the cancellation of a mortgage thereon, to which the owner has a good defence.

The right to bring such an action is never barred by the statute of limitations.

In an action brought to procure the cancellation and discharge of a mortgage, on the ground that it had been procured by duress, the trial court found that the execution of the mortgage was procured by defendants by threats and menaces, to the effect that unless the mortgagor gave it,

begins to run against them from the time when they actually paid the debt, and not from the time when they become liable to pay it.¹ But, unless the surety or indorser pays the note within the time limited by statute, he cannot by a payment made by him afterwards make the maker liable to him therefor, especially in those States where by statute payment or acknowledgment by one co-maker, &c., does not take the debt out of the statute as to the others.² Where one sued as indorser sets up in defence that the transfer was made to the plaintiff to deprive him of the defence of want of consideration, the indorser's cause of action against the last indorser arises from the date of judgment.³ If a surety or indorser pays a note before it becomes due, his right of action does not accrue until the note by its terms becomes due;⁴ as a surety cannot change the legal relations of the maker to the note by any action of his before it becomes payable, nor by forestalling its payment can he acquire any rights against the maker which the holder of the note did not possess.

The rule that a right of action accrues to the surety from the time he pays the money, and not from the time when the original debt becomes payable, is subject to the exception, that he must have paid the original debt before the statute had run thereon; as otherwise, especially in those States whereby statute payment by one joint contractor or promisor does not remove the statutory bar as to the other, a recovery could not be had by him if the original debt was then barred as to the principal debtor.⁵ When the principal debtor, by reason of the running of the statute, has been released from any legal liability to pay the debt, a surety who has been compelled to pay it, because, by reason of some statutory exception, the statute has not run as to him, cannot recover of the principal debtor.⁶ Instances may arise where the surety has no redress; as, where he becomes surety upon a note for an infant,

they would cause her son to be sent to state-prison for larceny and embezzlement, for which he was under arrest and indictment on their complaint, they stating if their terms were complied with they would release the prisoner, if in their power, but if not complied with he would be sent to state-prison; that she executed the mortgage while under fear, terror, coercion, and duress created by the threats, and that the prisoner was immediately thereafter discharged on his own recognizance. Held, that the finding were sufficient to sustain a judgment for the relief sought.

Solinger v. Earle, 82 N. Y. 393; and *Haynes v. Rudd*, 102 N. Y. 372, held not to be in conflict.

¹ *Pope v. Bowman*, 27 Miss. 194.

² In *Williams v. Durst*, 25 Tex. 667, it was held that where an accommodation

indorser pays a note before the statute runs upon it, but does not bring suit until after the statute has run on the note, he cannot recover of the maker; because he acquires no greater rights than the holder of the note possessed.

³ *Price v. Emerson*, 16 La. An. 95.

⁴ *Tillotson v. Rose*, 11 Met. (Mass.) 299.

⁵ The law will not raise a promise on the part of the principal to reimburse the surety where the surety was under no legal obligation to pay. *Kimble v. Cummins*, 3 Met. (Ky.) 327. This rule was adopted in *Cooke v. Hoffman*, 5 Lea (Tenn.), 105, and a surety who paid the debt after it was barred as to the sureties was held not entitled to recover of a co-surety. See also *Campbell v. Brown*, 86 N. C. 376.

⁶ *Stone v. Hammett*, 83 Cal. 547.

not given for necessities. In such a case, if the infant escapes upon a plea of infancy, and judgment is rendered against the surety, he has no right of redress from the infant, but stands to the note and judgment in the relation of principal.¹ But where a note is given by an infant for necessities, with a surety, and the surety pays the debt, he has an immediate right of action against the infant thereon, and the statute runs from that time.² Where there are two or more sureties, and each pays a moiety of the debt, each has a separate and distinct cause of action against him therefor; consequently, in such a case, the statute begins to run against the claim of each from the time when each paid his share.³ The remedy of a surety is the same whether he was surety upon a simple contract or a specialty debt.⁴ His remedy is by *indebitatus assumpsit* for money, and not for money had and received.⁵

At the common law, a payment made by the principal debtor upon a note before the bar of the statute has become complete, keeps the debt alive both as to himself and the surety; but where the payment is made after the completion of the bar of the statute, it revives the debt only as to the party making the payment.⁶

¹ Short v. Bryant, 10 B. Mon. (Ky.) 10.

² Conn v. Colburn, 7 N. H. 368.

³ Peabody v. Chapman, 20 N. H. 418.

⁴ Cunningham v. Smith, 1 Harp. (S. C.) Eq. 90; United States v. Preston, 4 Wash. (U. S. C. C.) 446. But *contra*, see Shultz v. Carter, Spears (S. C.) Eq. 588, where it was held that the surety could, upon payment of a specialty debt, set it up as a specialty.

⁵ Ward v. Henry, 5 Conn. 59, 61; Powell v. Smith, 8 Johns. (N. Y.) 249.

⁶ Cross v. Allen, 141 U. S. 528. In this case the court said: "Under the Civil Code of Oregon, the period of limitation for promissory notes is six years; and it is argued that, as the notes in this controversy were not sued on until more than six years from the dates when they respectively became due, an action on them would not lie, notwithstanding the fact that the maker made payments of interest upon them from time to time. The facts in this matter are these: The first note was dated Nov. 1, 1871, payable in three years. Consequently it matured Nov. 4, 1874, and if no payment of interest had been made the bar of the statute would have been complete Nov. 4, 1880; but in 1877, 1878, 1880, and on the 22d of December, 1881, partial payments of interest were made on the note by Thomas Cross or in his interest. The second note was

dated Jan. 23, 1872, payable in one year, and consequently matured Jan. 26, 1873. The bar of the statute on this note would have been complete Jan. 26, 1879, had no interest been paid upon it in the mean time. It is averred in the bill and admitted in the answer that the interest on this note was paid in full up to Jan. 25, 1879, one day before the completion of the bar; and another payment of interest was made Feb. 1, 1883. This suit was commenced August 6, 1884. Consequently it is to be observed that there never was a period of six years between the making of either note and the bringing of this suit, that no payments were made upon them. Section 25 of the Code of Civil Procedure of Oregon provides as follows: 'Whenever any payment of principal or interest is made on an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, after the same becomes due, the limitation shall commence from the time the last payment was made.'

"It is conceded that the payments of interest above referred to served to keep the debt alive, so far as the principal was concerned; but it is argued that they did not do so with reference to the surety. Pluma F. Cross, or her estate, especially in view of the fact that she died before the maturity of either note, and also in view of the fact that she never signed the notes at all,

So long as demands secured by a mortgage are not barred by the statute, there can be no laches in prosecuting a suit upon the mortgage to enforce them. LAMAR, J., in the case last cited upon this point, says: "The question of laches and staleness of claim virtually falls with that of the defence of the statute of limitations. So long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgage to enforce those demands. The mortgage is virtually a security for the debt, and an incident of it.¹ And it is immaterial that the failure to sue upon the demands may have resulted injuriously to the surety, so long as there was no variation in the original contract of suretyship, either as respects a new consideration or a definite extension of time, since it is a familiar principle of law that the mere omission or forbearance to sue the principal without the request of the surety will not discharge the surety."

but became a legal surety by reason of having signed the mortgages.

"This presents a question worthy of much consideration. At common law, a payment made upon a note by the principal debtor before the completion of the bar of the statute served to keep the debt alive, both as to himself and the surety. *Whitcomb v. Whiting*, 2 Dougl. 652; *Burleigh v. Stott*, 8 Barn. & C. 36; *Wyatt v. Hodson*, 8 Bing. 309; *Mainzinger v. Mohr*, 41 Mich. 685.

"That is the rule in many of the States of this Union,—in all, in fact, where it has not been changed by statute. *National Bank of Delevan v. Cotton*, 53 Wis. 31; *Quimby v. Putnam*, 28 Me. 419. At common law, and in those States where the common law rule prevails, a distinction is made between those cases in which a part payment is made by one of several promisors of a note before the statute of limitations has attached, and those in which the payment is made after the completion of the bar of the statute; it being held in the former that the debt or demand is kept alive as to all, and in the latter, that it is revived only as to the party making the payment. *Atkins v. Tredgold*, 2 Barn. & C. 23; *Sigourney v. Drury*, 14 Pick. (Mass.) 391; *Ellicott v. Nichols*, 7 Gill (Md.), 85, and cases cited. The reason of this distinction lies in the principle that, by withdrawing from a joint debtor the protection of the statute, he is subjected to a new liability not created by the original contract of indebtedness.

"There is no statute of Oregon, so far as we have been able to discover, changing the common law rule of liability with reference to sureties. Consequently, under the admitted facts of this case, it must be held that the statute of limitations of the State never operated as a bar to the enforcement of the original demands against both the principal and the surety.

"Nor do we think the death of the surety before either of the demands matured makes any difference, in principle, where, as in this case, the liability is not of a personal nature, but is an incumbrance upon the surety's property. We are aware that there is authority holding that payment of interest by the principal debtor, after the death of the surety, but before the statute of limitations has run against the note, will not prevent the surety's executors from pleading the statute. *Lane v. Doty*, 4 Barb. (N. Y.) 530; *Smith v. Townsend*, 9 Rich. (S. C.) L. 44; *Byles, Bills*, Sec. 353; 2 *Parsons, Notes & Bills*, 659, and note 4. But we know of no authority extending this rule to the representatives of a deceased surety whose liability was not personal but upon mortgaged property. On the contrary, the cases of *Miner v. Graham*, and *Bank of Albion v. Burns*, *supra*, seem to recognize the doctrine which we are inclined to accept. We conclude, therefore, that the contract of suretyship in this case was not terminated by the death of the surety before the maturity of the indebtedness."

¹ *Ewell v. Daggs*, 108 U. S. 143.

SEC. 146. Contract of Indemnity, Guaranties, &c. — Contracts of indemnity are so largely dependent upon the particular stipulation that the guarantor has made that no general rule can be given as to when his liability attaches against those for whom he has assumed that position that will be applicable in all cases, except that the statute begins to run when the promisee has taken all the requisite steps to charge him with liability, and his liability under his contract to pay the debt is full and complete,¹ and the promisee cannot prolong this period of liability by any unreasonable delay in taking these requisite steps.² A guaranty has aptly been termed a contract to indemnify another upon a contingency, and is in the nature of a claim for unliquidated damages.³ They are either absolute or contingent,⁴ and the distinction between them in this respect is of vital importance in determining the time when the statute begins to run in favor of the guarantor. Thus, an absolute

¹ In *Colvin v. Buckle*, 8 M. & W. 680, it appeared that in 1816 G. shipped goods on board a vessel chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & Co., who were to dispose of the outward cargo there and send the proceeds in goods or bills to B. & Co., in London, who were to reimburse themselves their charges and hold the balance at the disposal of G. In November, 1817, G. being in difficulties and indebted to the defendants in £850, the defendants and G. applied to B. & Co. to pay off this debt, by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guaranty: "Messrs. B. & Co., You having expressed some doubts of the propriety of paying G.'s draft on you for £850 in our favor, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s spending account with you, or from any other circumstances." B. & Co. thereupon accepted and paid a bill for £850, drawn by G. on them in favor of the defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner (G. having become bankrupt), gave notice to the East India Company, in whose docks she lay, not to deliver any part of the cargo without his authority; they thereupon sold the cargo, and paid

the owner's demand for freight, and, in consequence of conflicting claims from G.'s assignees and from B. & Co., filed an interpleader bill, and paid the balance of the proceeds into court. Proceedings at law and equity were continued between all the above parties, under legal advice, up to the year 1837, when the result was that B. & Co. were obliged to pay C.'s costs. In 1838 B. & Co. demanded of the defendants the £850 due by the guarantee, with interest, and their share of the expenses incurred in the law proceedings, and on their refusal to pay brought an action against them on the guaranty. Held, first, that the statute of limitations began to run against the plaintiffs, not from the termination of the legal proceedings in 1837, but from the return and sale of the cargo in 1818, when all the facts were ascertained upon which the defendants' legal liability depended, and therefore that it was a bar to the action; secondly, that the defendants could not be made liable under the guaranty for the expenses incurred by the plaintiffs in the law proceedings.

² In *Eddowes v. Neel*, 4 Dall. (Penn.) 133, a delay of nineteen years fully accounted for was held not of itself sufficient to discharge the guarantor.

³ *Sampson v. Burton*, 2 B. & B. 89.

⁴ *Rudy v. Wolf*, 16 S. & R. (Penn.) 79; *Woods v. Sherman*, 71 Penn. St. 100; *Moakly v. Riggs*, 19 Johns. (N. Y.) 69; *Sylvester v. Downer*, 18 Vt. 32; *Allison v. Waldham*, 24 Ill. 132.

guaranty is one by the terms of which the guarantor undertakes that another person shall perform by the time fixed in the contract, and upon which he becomes liable to pay the debt or damages at maturity upon the other's failure; as, "I guarantee the payment of this note at maturity."¹ Such a guaranty is absolute, and a right of action accrues against the guarantor immediately upon the maturity of the note, without taking any steps against the maker of the note.² So where on the sale of goods it was agreed that they should be paid for on delivery, and the defendant signed a guaranty as follows: "On the part of A. and B. I hold myself responsible with them on the above contract," it was held that his undertaking bound him to a direct performance of the contract, and was in effect that he or his principals would pay for the goods on delivery.³ Where the guaranty is absolute, the guarantor is not entitled to demand or notice; but his liability to suit arises and is fixed at the same moment that an action accrues against the principal debtor, or, if a later period is in terms fixed upon, upon the arrival of the time named therein,⁴ and the guarantor may be sued thereon without any previous suit against the principal debtor.⁵ Contingent guar-

¹ Koch v. Melhorn, 25 Penn. St. 89; Cochran v. Dawson, 1 Miles (Penn.), 276.

² Roberts v. Riddle, 79 Penn. St. 468; Reigart v. White, 52 id. 488; Anderson v. Washabaugh, 43 id. 115. In Williams v. Granger, 4 Day (Conn.), 444, the defendant made a special contract on the back of a promissory note payable to the plaintiff, in which he guaranteed, for value received, that the maker then was, and would continue to be until the note should become due, of sufficient responsibility to pay it; and then added, "and I further engage with the promisee that if the moneys mentioned in said note are not paid by the 5th of September, 1807, I will on that day advance the same to him, taking and holding the note as my own at my own risk." The maker did not pay the note either at maturity or on the day stated in the guaranty. The court held that the guaranty became absolute on the failure of the maker of the note to pay on the day specified, and that a right of action then accrued against the defendant upon the guaranty without a previous suit against the maker or any proof of the maker's insolvency.

Where a person contracts to indemnify a person and save him harmless from certain claims, the statute does not begin to run until the person to whom the indemnity is given has paid the debt. Hall

v. Thayer, 12 Met. (Mass.) 130. And such also is the rule where money is paid for another at his request. Perkins v. Littlefield, 5 Allen (Mass.), 370.

³ King v. Studebaker, 15 Ind. 45; Cross v. Ballard, 46 Vt. 415; Campbell v. Baker, 46 Penn. St. 243; Krumph v. Hatz, 52 id. 525. A writing in the words, "I will guarantee the payment to you of \$625, in treasury warrants to be paid on or before the 20th August on and for account of J. W.," was held an original and absolute promise. Matthews v. Chrisman, 20 Miss. 595.

⁴ Smith v. Ida, 3 Vt. 301; Dickerson v. Derrickson, 30 Ill. 574; Bowman v. Curd, 2 Bush (Ky.), 565; Young v. Brown, 3 Sneed (Tenn.), 89; Lane v. Levillian, 4 Ark. 76; Ege v. Barnitz, 8 Penn. St. 304; Breed v. Hillhouse, 7 Conn. 523; Douglass v. Howland, 24 Wend. (N. Y.) 35; Noyes v. Nichols, 28 Vt. 160; Sibly v. Stuhl, 15 N. J. L. 832; Bank v. Hammond, 1 Rich. (S. C.) 281; Beebe v. Dudley, 26 N. H. 249; McDougal v. Calef, 34 N. H. 534; Simons v. Steele, 36 id. 73; Cox v. Brown, 6 Jones (N. C.) L. 100.

⁵ Bank of New York v. Livingston, 2 Johns. (N. Y.) Cas. 409; Morris v. Wadsworth, 17 Wend. (N. Y.) 103; Huntress v. Patton, 20 Me. 28; Kach v. Melhorn, 25 Penn. St. 89; Roberts v. Riddle, 79 id. 468; Cochran v. Dawson, 1 Miles (Penn.),

anties are those in which the guarantor does not assume an absolute liability, but binds himself to perform in case the debtor fails to do so. Thus, where a person guarantees that a note "is collectible," he does not bind himself absolutely to pay the note, but only to do so in the event that the maker proves insolvent.¹ In other words, a contingent guaranty is one which only becomes absolute when the creditor, by due and unsuccessful diligence to obtain satisfaction from the principal, fails to do so, or by circumstances that excuse diligence.² A guaranty "against loss" on a note, bond, or mortgage, is a contingent one, putting the creditor on his diligence;³ so also a guaranty that a note "is good,"⁴ or to pay in case the holder "fails to recover the money on said note,"⁵ are all contingent guaranties; and, indeed, so are all that impose upon the person to whom they are given the duty of first exhausting his remedies against the principal.⁶ The distinction, then, to be observed is, that in the case of a contingent guaranty a right of action does not accrue against the guarantor immediately upon the failure of the principal to perform, but imposes upon the creditor the duty of exhausting his remedy against the principal before he resorts to the guarantor, or must show satisfactorily that the affairs of the principal were in such a condition that any pursuit of him would have proved fruitless.⁷ Consequently, in the case of a contingent guaranty, as the statute begins to run when the right of action against the guarantor becomes complete, it follows that it only attaches in his favor when the necessary steps to fix his liability have been taken and are fully completed.

SEC. 147. Money paid for Another. — Where money is paid for another under such circumstances that the law will imply a promise to repay it, and no time is fixed for its repayment, the right of action accrues at once; but if the payment is made in liquidation of a note or contract not matured, the right of action does not accrue until the debt has matured, and if anything remain to be done to effectuate the payment, a right of action does not accrue until that is done. Thus, where an administratrix brought an action to recover money paid in liquidation, one of two notes secured by mortgage, it was held that the statute began

276; *Smeidel v. Llewellyn*, 3 Phila. (Penn.) 70; *Douglass v. Reynolds*, 7 Pet. (U. S.) 113; *Brown v. Curtis*, 2 N. Y. 225.

¹ *McDoal v. Yomans*, 8 Wall. (Penn.) 361.

² *Gilbert v. Henck*, 30 Penn. St. 205; *Woods v. Sherman*, 71 id. 100; *Hoffman v. Brechtel*, 52 id. 190.

³ *Griffith v. Robertson*, 15 Hun (N. Y.), 344; *McMurrey v. Noyes*, 72 N. Y. 523.

⁴ *Cook v. Nathan*, 16 Barb. (N. Y.) 342.

⁵ *Jones v. Ashford*, 79 N. C. 172.

⁶ *Compston v. McNair*, 1 Wend. (N. Y.)

45; *Pollock v. Hoag*, 4 E. D. Sm. (N. Y. C. P.) 473; *Vanderkemp v. Shelton*, 11 Paige (N. Y.) Ch. 28; *Newell v. Fowler*, 23 Barb. (N. Y.) 628.

⁷ *Dyer v. Gibson*, 16 Wis. 557; *Parker v. Culvertsen*, Wall. Jr. (U. S.) 149; *Benton v. Fletcher*, 31 Vt. 418; *Wheeler v. Lewis*, 11 id. 265; *Dana v. Conant*, 30 id. 246; *Sandford v. Allen*, 1 Cush. (Mass.) 473; *McClurg v. Fryer*, 15 Penn. St. 293; *Cody v. Sheldon*, 38 Barb. (N. Y.) 103; *Stark v. Fuller*, 42 Penn. St. 320; *Thomas v. Woods*, 4 Cow. (N. Y.) 173.

to run from the date of the discharge of the mortgage, and not from the time when the payment was made.¹

SEC. 148. Action under Enabling Acts. — Where a statute gives a party the right to sue on an existing claim where such right did not exist before, and is silent as to the time when the statute shall begin to run thereon, it attaches and begins to run from the day the act first took effect, unless suit might have been brought in the name of another, — as the assignee of a case, — in which case it begins to run from the time the claim first accrued.²

SEC. 149. Actions against Stockholders of Corporations. — Where, by statute, the stockholders of a corporation are made liable for the debts of the corporation, their liability commences when the liability of the corporation commences, and ends at the same time that liability on the part of the corporation ends. But, if the statute provides that no action shall be commenced against them until after judgment and execution unsatisfied against the corporation, their liability does not begin, nor the statute begin to run in their favor, until the return of the execution aforesaid. But if, notwithstanding such provision, the statute also provides that they may be jointly sued with the corporation, the statute begins to run in their favor at the same time that it begins to run in favor of the corporation.³ The statute begins to run upon sub-

¹ *Lun v. McLoon*, 58 Me. 321.

² *Cross's Case*, 4 Ct. of Cl. (U. S.) 271.

³ *Conklin v. Furman*, 8 Abb. (N. Y.) Pr. n. s. 161.

Baker v. Atlas Bank, 9 Met. (Mass.) 182.

No privity exists between the stockholders and a creditor of the corporation. The stockholder can only be reached by the creditor through the corporation; and if the debt due from the stockholder is barred as against the corporation, the creditor cannot enforce its payment in equity. *Bassett v. Hotel Co.*, 47 Vt. 313; *Terry v. Anderson*, 95 U. S. 635; *Manufacturing Co. v. Bank*, 6 Rich. Eq. (S. C.) 234; *Cherry v. Lamarr*, 58 Ga. 541. And the running of the statute between the corporation and the stockholder is not suspended by the recovery of a judgment against the corporation, or by any note or written obligation of the corporation given by the officers after it has gone into liquidation. *Stilphen v. Ware*, 45 Cal. 110. After a corporation has gone into voluntary liquidation, it is to all intents and purposes in the same condition as a dissolved partnership, and cannot create any new debt against a corporation. *White v.*

Knox, 111 U. S. 784; *Parker v. Macomber*, 18 Pick. (Mass.) 505. It cannot renew or extend any stock liability by any contract made with the creditor. Where a bill in equity is brought by a creditor against a corporation in behalf of all the creditors, no creditor is entitled to recover who does not come forward to present his claim. *Richmond v. Irons*, 121 U. S. 27.

In *Rector, &c. v. Vanderbilt*, 98 N. Y. 170, the plaintiff leased to a corporation, organized under the general manufacturing act, certain premises for a term of years commencing Nov. 1, 1872. The lessee, among other things, agreed to pay all taxes and water-rates imposed each year, and in case the same were not paid before the first day of February next, after they were imposed, it agreed to pay to the plaintiff on that day, as additional rent, the amount necessary to pay and discharge them. The lessee did not pay the taxes and water-rates imposed for the years 1873 and 1874. The lessee failed to make annual reports as required by said act for the years 1873, 1874, and 1875. Because of such failure this action was brought in January, 1878, against the defendant, a trustee of said corporation, to recover the

scriptions to stock of a corporation from the time when each call is made for an instalment of the amount subscribed for.¹

amount of taxes and water-rates. It was held that at the time the reports should have been filed both for the years 1874 and 1875, a debt existed for the taxes and water-rates of the preceding years, but as the lessee had the alternative either to pay to the proper authorities or to pay on the first of February thereafter to the plaintiff, no cause of action accrued to it until that time; that, therefore, as to the taxes, &c., for 1873, the three years' statute of limitations began to run Feb. 1, 1874, and the cause of action was barred, but that for the taxes, &c., of 1874, the action was not barred and plaintiff was entitled to recover.

In *Brinckerhoff v. Bostwick*, 99 N. Y. 185, reversing 39 Hun, 352, it was held that the provision of the code, limiting to three years the time for bringing an action against a director or stockholder of a moneyed corporation "to recover a penalty or forfeiture imposed, or to enforce a liability created by law," does not apply to an equitable action against the director of such a corporation to require an accounting and to recover damages for their neglect and inattention to the duties of their trusts whereby they suffered corporate funds to be lost and wasted. Such an action is simply the enforcement of a common law liability, while the words of the provision, "a liability created by law," have reference only to a liability created by statute. The limitation applicable to such an action is ten years.

Where a national bank had become insolvent, and one of its directors had been appointed receiver, an action was brought against him and the other directors for neglect of their duties, by one of the stockholders on behalf of himself and the other stockholders; Held, that as to other stockholders who became parties to the action upon their petition, the statute of limitations began to run from the time of the commencement of the action, not from the time of filing their petitions; that for the purposes of the statute of limitations the action must be treated as if all the

stockholders were original plaintiffs. The original plaintiff could, at any time before other stockholders were made parties, and before judgment, have settled his individual claim, and executed a release thereof and discontinued the action, but upon prosecution to judgment it was for the benefit of all the stockholders and he ceases to have control over it. If stockholders do not come in, the suit having been commenced for their benefit, their rights are not barred by any lapse of time after the commencement.

Cunningham v. Pell, 6 Paige (N. Y.), 655, was distinguished.

The stockholders of a corporation are not personally liable for the debts of a corporation against which the statute had run before its charter expired. *Van Block v. Whitlock*, 3 Paige (N. Y.) Ch. 409.

In *Hollingshead v. Woodward*, 107 N. Y. 69, under the provision of the general manufacturing act, declaring, "that no suit shall be brought against any stockholder" of a company organized under said act, "who shall cease to be a stockholder, . . . unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder," whenever a stockholder shall be divested of his interest in or control over the affairs of the corporation, by actual dissolution thereof by formal judgment, or by a surrender of its corporate rights, privileges, and franchises, the time begins to run, and at the end of two years therefrom the stockholder is no longer liable for any debt of the corporation.

In an action seeking to charge defendant as a stockholder of such a corporation with a judgment against it, on the ground that the whole capital stock was not paid in, or a certificate of payment filed as required by the act, the answer set up among other things, in substance, that more than four years before the commencement of the action a judgment was rendered in an action against the corporation sequestrating its property, appointing a permanent receiver thereof, and restraining its officers

¹ *Western R. R. Co. v. Avery*, 64 N. C. 491.

SEC. 150. Stock Subscriptions. — Where no time is fixed for payment by the terms of a subscription for the stock of a corporation, but the same is left subject to call, the statute begins to run from the date of each call for an instalment thereof by the proper authority.¹ In a Pennsylvania case,² by the terms of the subscription the money therefor was payable “in such manner, at such times, and in such proportions as shall be determined by the president and managers, and it was held that the statute did not begin to run thereon until after such determination and a demand made in pursuance thereof. But if the statute fixes the time within which payment shall be made, or if the time of payment is fixed in the subscription contract, the statute begins to run from the time therein designated for payment, as at that time, and not before, an action will lie for its recovery. If no time is designated either by statute or in the subscription itself, it would probably be treated as due upon demand, and the statute would begin to run from the date of subscription, upon the ground that where no time for payment is designated, it is treated as a debt due on demand, and the statute attaches from its date.³ Where such notes are made payable upon a certain number of days’ notice, a right of action does not accrue until the expiration of such notice duly given.⁴ If, by the charter or law under which the corporation is founded, the subscriptions do not become due until called for by resolution of the board of directors, the statute does not begin to run until such call has been regularly made.⁵ If the subscription fixes

and agents from all interference with it; that said corporation has not since transacted any business; that the receiver took possession of the property, and has distributed the proceeds among creditors pursuant to order of the court, the same not being sufficient to pay all of the company debts, and that defendant by reason thereof ceased to be a stockholder from the date of said judgment. On demurrer, held, that the answer set up a good defence; that by the conceded facts it appeared that when the organization was divested of its rights, privileges, franchises, and property, by virtue of the appointment of a receiver, it for all practical purposes ceased to exist, and the defendant ceased to be a stockholder within the meaning of the act, and after the expiration of two years he was discharged from all liability.

Kincaid v. Dwinelle, 59 N. Y. 548, distinguished and limited.

¹ *Western R. R. Co. v. Avery*, 64 N. C. 491; *Pittsburgh & Connellsville R. R. Co. v. Plummer*, 37 Penn. St. 413.

² *Sinkler v. Turnpike Co.*, 3 P. & W. (Penn.) 149.

³ *Grubbo v. Vicksburgh, &c. R. R. Co.*, 50 Ala. 398; *Phenix Warehousing Co. v. Badger*, 67 N. Y. 294.

⁴ *Cole v. Juliet Opera House Co.*, 79 Ill. 96.

⁵ *Bouton v. Dry Dock Stage Co.*, 4 E. D. Sm. (N. Y. C. P.) 420; *Ross v. Lafayette, &c. R. R. Co.*, 8 Ind. 297.

In *Williams v. Taylor*, 120 N. Y. 244, reversing 41 Hun, 545, certain paid-up stock of a corporation in the hands of its stockholders, was placed by them in the hands of a trustee for sale. M., the defendant’s intestate, subscribed for a portion of this stock, agreeing to pay therefor in accordance with the terms of the proposition under which subscriptions were invited. By those terms one-third of the price was to be paid down as soon as the stock was subscribed for, and the balance in instalments when called for by the board of trustees for the purposes of the business. In an action upon the subscription, more than six years after the payment down was made, but within six years after the first call, held, that it was not contemplated by the contract that the whole sub-

the time of payment, no demand is necessary, and the subscription becomes payable upon the arrival of the time named therein;¹ and such also is the rule when the time of payment has been fixed by a by-law of the company.² Thus, where by the terms of the subscription shares of stock were to be paid for by instalments of ten per cent every sixty days after the work was put in contract, it was held the subscriber was not entitled to notice of the time of the contract, and that bringing a suit upon the subscription was a sufficient demand.³ In other words, in such cases the subscriber is bound to inquire for himself and ascertain whether his subscription becomes due at the times specified or not. Generally, unless notice of an assessment or call is required by the charter or subscription, it is not an indispensable requisite to a right to bring an action; and, where it is not, the right of action doubtless dates from the date of the call.⁴

In a case in the United States Supreme Court,⁵ it was held that a

scription price should be paid at once; that, assuming that the call contemplated would be satisfied by a simple demand, the right to make actual demand was only complete when the exigencies of the business required it, and the trustee had no right to call for all at once, unless it was so required; that in the absence of proof to the contrary, it was to be presumed that the calls were made in accordance with the contract as thus construed, and so no part of the balance was due until a call was made; that, therefore, the statute of limitations was not a bar, and a dismissal of the complaint was error.

L. O. A. & N. Y. R. R. Co. v. Mason, 16 N. Y. 451; *Howland v. Edmonds*, 24 id. 307; *Tuckerman v. Brown*, 33 id. 297, distinguished.

¹ *New Albany, &c. R. R. Co. v. Pickens*, 5 Ind. 247.

² *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Winter v. Muscogee R. R. Co.*, 11 Ga. 438.

³ *Breedlove v. Martinsville, &c. R. R. Co.*, 12 Ind. 114.

⁴ *Eppes v. Mississippi, &c. R. R. Co.*, 35 Ala. 33.

⁵ *Glenn v. Leggett*, 135 U. S. 533; in this case *BLATCHFORD, J.*, in delivering the opinion of the court, said: "The facts set forth in the amended petition in the present case appeared in the case of *Hawkins v. Glenn*, 131 U. S. 319. That was a suit at law, brought in the Circuit Court of the United States for the Eastern

District of North Carolina, to recover the amount of the assessment or call of 30 per cent, made by the decree of Chancery Court of the city of Richmond, on Dec. 14, 1880. The statute of limitations of North Carolina, of three years, was pleaded as a defence. The suit having been brought within three years from Dec. 14, 1880, it was contended in this court, for the defendant, that the cause of action did not accrue within three years before the suit was brought; that the case was essentially unlike that of a call made by the authorities of a corporation which was still doing business; that, during the whole of the three years, the provision in the subscription, as affected by the statute of Virginia, which submitted the subscriber to the discretion of the president and directors, as to the time at which calls might be made, had become null; and that, inasmuch as, after the corporation stopped business, the time of making a call was no longer a matter of discretion, but was subject to the direction of the law, the lapse of time before bringing the suit in the Chancery Court of the city of Richmond was to be counted in reckoning, under the statute of limitations, whether the suit subsequently brought against the defendant, under the call made by that court, had been brought in good time.

It was also contended in that suit by the defendant, that the decree of the Chancery Court of the city of Richmond was void as against him, because he was

stockholder is bound by a decree against the corporation, such as making an assessment in the enforcement of a corporate duty, although as

not a party to the suit. On the latter point this court said: "We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member,"—citing *Sanger v. Upton*, 91 U. S. 56; *Morgan County v. Allen*, 103 U. S. 498; *Glenn v. Williams*, 60 Md. 93; *Hambleton v. Glenn*, 13 Va. L. J. 242.

This court said that it concurred in the decision of the Court of Appeals of Virginia, in *Hambleton v. Glenn*, made as to the statute of Virginia, that "as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired;" and that it was the decision "of the highest tribunal of the State where the corporation dwelt, in reference to whose laws the stockholders contracted, and in whose courts the creditors were obliged to seek the remedy accorded,"—citing *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527; *Barclay v. Talman*, 4 Edw. Ch. 123, 6 N. Y. Ch. L. ed. 821; *Bank of Virginia v. Adams*, 1 Paris Eq. Cas. 534; *Patterson v. Lynde*, 112 Ill. 196.

This court further said: "We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members, in the absence of fraud, and this is involved in the contract created in becoming a stockholder. The decree of the Richmond Chancery Court determined the validity of the assessment; and that the lapse of the time between the failure of the company and the date of the decree did

not preclude relief, by creating a bar through statutes of limitation or the application of the doctrine of laches. And so it has been held in numerous cases referred to on the argument. The court may have erred in its conclusions, but its decree cannot be attacked, collaterally; and, indeed, upon a direct attack, it has already been sustained by the Virginia Court of Appeals. *Hambleton v. Glenn, supra*. . . . Although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he cannot be allowed to insist that the amount required to discharge him became instantly payable, though unascertained, and though there was no request, or its equivalent for payment. And here there was a deed of trust made by the debtor corporation for the benefit of its creditors; and it has been often ruled in Virginia that the lien of such a trust deed is not barred by any period short of that sufficient to raise a presumption of payment. *Smith v. Washington City, V. M. & G. S. R. Co.*, 33 Gratt. 617; *Bowie v. Poor School Society*, 75 Va. 300; *Hambleton v. Glenn*, 13 Va. L. J. 242. This deed was not only upheld and enforced by the decree of Dec. 14, 1880, but also the power of the substituted trustee to collect the assessment by suit in his own name was declared by the Court of Appeals in Virginia, in *Lewis v. Glenn*, 84 Va. 947. See also *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287. By the deed, the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment; and as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the statute of limitations could not commence to run until after the call was made."

This court then cited the rule laid down in *Scoville v. Thayer*, 105 U. S.

an individual he was not a party to the action, the corporation being treated as his agent. And this is so although the corporation has ceased the prosecution of the objects for which it was organized. It being held, that for the collection of the debts, the enforcement of liabilities, and the payment of its creditors, its corporate powers still remain unimpaired. Upon the insolvency of a corporation, the obligation of the stockholder to pay enough of the amount unpaid on his stock to pay its debts does not become complete until a call or demand for payment, and the statute does not begin to run until such call or demand is made; and he cannot set up the statute as a bar to an action to collect his subscription for the payment of creditors because the company did not discharge its corporate duty in respect to its creditors earlier.

SEC. 151. Money payable by Instalments. — We have already seen¹ that where money is payable by instalments, the statute begins to run

143, as applying to the case before it, and said: "In that case it was said by MR. JUSTICE WOODS, speaking for the court: 'There was no obligation resting on the stockholder to pay at all, until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.' And it was held 'that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. . . . But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him

for payment; and it is clear the statute of limitations does not begin to run in his favor until such order or demand. Constituting, as unpaid subscriptions do, a fund for the payment of corporate debts, when a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may, by bill in equity, or other appropriate means, subject such subscriptions to the satisfaction of his judgment, and the stockholder cannot then object that no call has been made. As between creditor and stockholder, 'it would seem to be singular if the stockholders could protect themselves from paying what they can owe by setting up the default of their own agents.' *Hatch v. Dana*, 101 U. S. 205, 214. The condition that a call shall be made is, under such circumstances, as MR. JUSTICE BRADLEY remarks in *Re Glen Iron Works*, 20 Fed. Rep. 674, 681, 'but a spider's web, which the first breath of the law blows away.' And as between the stockholder and the corporation, it does not lie in the mouth of the stockholder to say, in response to the attempt to collect his subscription, for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier. *Morgan County v. Allen*, 103 U. S. 498. These considerations dispose of the alleged error in not sustaining the defence of the statutory bar."

¹ *Ante*, p. 360 *et seq.*

upon each instalment from the time when it becomes due.¹ But we have also seen that this rule does not apply to interest payable annually; but that in such a case, although an action lies for the interest as it matures, yet the statute does not begin to run thereon until some part of the principal becomes due.² In a Pennsylvania case³ it was held that where there was a parol guaranty of the sufficiency of a mortgage given to secure a bond payable by instalments, the statute does not begin to run until six years after the last instalment becomes due.⁴ So where subscriptions to the stock of a turnpike company by a statute were made payable at such times and in such proportions "as shall be determined by the president and managers," it was held that the statute did not begin to run on any part thereof until after such determination, and a demand made in pursuance thereof.⁵

SEC. 152. Over-payments. Money paid by Mistake. — Where money is paid by one to another by mistake, the statute begins to run from the time of the payment, and not from the time the mistake was discovered.⁶ Thus, where under a mistake as to their liability the plaintiffs paid upon the return of a bill of exchange drawn in Kentucky and payable in New Orleans, which was protested, ten per cent as damages, where under the laws of Kentucky no damages were collectible, it was held that the statute began to run, upon the right to recover it back, from the time the money was paid, and not from the time when they ascertained what their rights were in the premises.⁷ But where the parties are in the habit of striking balances at stated periods, it is held that the statute begins to run from the striking of such balance. In an action by a bank to recover of a depositor an amount of money

¹ *Bushe v. Stowell*, 71 Penn. St. 208; *Baltimore Turnpike Co. v. Barnes*, 6 H. & J. (Md.) 57; *Burnham v. Brown*, 23 Me. 400. In *Robertson v. Pickerell*, 77 N. C. 303, where the plaintiff made a contract with the defendant to do certain work, which was to be measured and paid for monthly, it was held that the statute began to run at the end of each month.

² *Grafton Bank v. Doe*, 19 Vt. 463; *Ferry v. Ferry*, 2 Cush. (Mass.) 92; *Henderson v. Hamilton*, 1 Hall (N. Y. S. C.), 814.

³ *Overton v. Tracy*, 14 S. & R. (Penn.) 311.

⁴ See also to the same effect *Jones v. Trimble*, 3 Rawle (Penn.), 381; *Roe v. Foster*, 4 W. & S. (Penn.) 351. In *Gonsoulin v. Adams*, 28 La. An. 598, where the purchase-money for lands sold at sheriff's sale was payable by instalments, it was held that the statute began to run

in favor of the purchaser from the time the first instalment became due, and that the right of the vendor to bring an action to set aside the sale became complete upon the first default, and presumption ran against it from that time, and not from the date of the last instalment.

⁵ *Sinkler v. Turnpike Co.*, 3 P. & W. (Penn.) 149. In order to prevent the operation of the statute, because of a contingency, the contingency must be one named in the contract itself; and the fact that a demand depends upon the contingency of the rectification of a mistake in the contract by a court of equity, does not prevent the operation of the statute. *Jones v. Lightfoot*, 10 Ala. 17.

⁶ *Clark v. Dutcher*, 9 Cow. (N. Y.) 674.

⁷ *Bank of United States v. Daniels*, 12 Pet. (U. S.) 32; *Shelburne v. Robinson*, 8 Ill. 597.

overpaid to him through mistake, it was held that the statute began to run from the date of the monthly balance struck in the depositor's bank-book, and not from the time the money was paid.¹ And where an administrator paid a debt under the erroneous belief that the estate was solvent, it was held that the statute did not begin to run against his claim to recover it back from the time the money was paid, but from the time the insolvency of the estate is ascertained by a decree of insolvency and order of distribution.² But where an executor voluntarily paid over money to a legatee, and ten years afterwards claimed that he had paid too much and brought an action to recover it back, it was held that the action was barred.³ And also, where an administrator found a mortgage-deed among the testator's papers, and assigned it, and it turned out to be a forgery, it was held that the statute began to run from the date of the assignment.⁴

SEC. 153. Failure of Consideration. — Where money has been paid upon a consideration that ultimately fails, the statute does not begin to run until such event; as, until that time, no right of action accrues to recover back the money paid.⁵ Thus, if money is paid upon a contract for the sale of land, which the vendor refuses to or is unable to convey the statute does not begin to run against the vendor for the money paid until the vendor has refused or become unable to convey the land, at which time the consideration fails, and a right of action to recover it back arises;⁶ and it has been held in some of the cases that the same

¹ *Union Bank v. Knapp*, 3 Pick. (Mass.) 96. In *Johnson v. Rutherford*, 10 Penn. St. 455, where money was overpaid on a contract for work, it was held that the statute did not begin to run until the payment of the balance on final settlement.

² *Walker v. Bradley*, 3 Pick. (Mass.) 261.

³ *Shelburne v. Robinson*, 8 Ill. 597. See also *Gamble v. Hicks*, 27 Miss. 781, *Johnson v. Rutherford*, 10 Penn. St. 455.

⁴ *Bree v. Holbrook*, Doug. 654.

⁵ *Richards v. Allen*, 17 Me. 296. Where a debtor conveys lands to his creditor as collateral security for a debt, under an agreement that it shall be reconveyed on payment of the debt, the statute does not begin to run upon the creditor's agreement to reconvey until an offer of settlement has been made. *Hall v. Fenton*, 105 Mass. 516. See *Eames v. Savage*, 14 id. 425, as to the time when the statute begins to run for the consideration paid upon a parol contract for

the sale of lands. *Hilton v. Duncan*, 1 Coldw. (Tenn.) 313.

⁶ *Taylor v. Rowland*, 26 Tex. 293; *Harris v. Harris*, 70 Penn. St. 170; *Evans v. Lee*, 28 id. 88; *Bowles v. Woodson*, 6 Gratt. (Va.) 78; *Stewart v. Keith*, 12 Penn. St. 238. In *Baxter v. Gay*, 14 Conn. 119, after the death of A. in August, 1833, B., C., and D., his heirs, verbally agreed to make a division of the real estate into three parts, and that they should each have one part. The division was made and the parts allotted accordingly; but the part allotted to B. was of less value than that allotted to C.; and it was a part of the same agreement that C. should pay B. fifty dollars. Deeds were immediately executed by all the parties, in pursuance of the agreement; but B. was then *feme covert*, and her husband did not give in her deed to C., which was consequently void. Nothing further was done until May, 1837, when a valid deed was executed by B. and her husband to C. In an action brought by B., in 1838, to recover the fifty dollars,

rule obtains where personal property to which the vendor had no title is sold.¹ But in Kentucky it has been held that an implied warranty of title is broken at once if the vendor has no title, and that the statute begins to run from the date of the contract;² and such seems to be the doctrine generally held,³ especially relative to breaches of warranties as to the quality of property sold.⁴ Where, however, lands are purchased and conveyed by a warranty-deed that is invalid because of the grantor's failure to comply with certain statutory requirements, the grantee instantly has a right of action to recover it back, and the statute begins to run from that time. Thus, where a person purchased land of a guardian, and the guardian having failed to comply with certain statutory provisions the deed was a nullity, in an action by the grantee to recover back the consideration-money it was held that the statute began to run from the day the money was paid, and not from the time that the defect in the conveyance was ascertained;⁵ and the same doctrine was held in Alabama in a case where a person went into possession under a void deed.⁶ Where, under a parol or even a written con-

the defendant, among other defences, set up the statute of limitations. The court held that the right of action against C. did not accrue until the delivery of the valid deed to C., and that the action being brought within three years from that time was seasonably brought. "Had the contract which is stated in the declaration been in writing," said SHERMAN, J., "the right of action would not have accrued until the deed was given by the plaintiff and his wife to the defendant Harriet. She was not bound to pay for the land until she received a title."

¹ *Coplinger v. Vaden*, 5 Humph. (Tenn.) 629; *Gross v. Kiercke*, 41 Cal. 111.

² *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 201.

³ *Richards v. Allen*, *ante*.

⁴ *Baucum v. Streeter*, 5 Jones (N. C.) L. 70.

⁵ *Furlong v. Stone*, 12 R. I. 437. In *Bishop v. Little*, 3 Me. 405, a similar doctrine was held where the plaintiff purchased certain lands which were claimed by certain proprietors for whom the defendant acted or assumed to act as agent, and paid to him the purchase-money and took a deed under an assurance of the defendant that the title of the defendants extended to and included the land within six years before the commencement of the action; but more than six years after

the delivery of the deed and payment of the money it was discovered that the title of the proprietors did not cover the land in question. The court held that the statute began to run against the plaintiff's claim to recover back the purchase-money, if he ever had any such claim, from the time when the money was paid and the deed delivered, and not from the time when the defect in the title was discovered, there being no fraudulent concealment on the defendant's part.

⁶ *Molton v. Henderson*, 62 Ala. 426. In this case it was held that where the legal title to land resides in trustees or the survivors of them, and such lands are sold under void proceedings by a guardian of the *cestui que trust*, and the purchaser goes into possession, the statute of limitations begins to run from the date of such sale and possession under it, and is not suspended by the death of the trustee after such possession accrued. *Mixler v. Sullivan*, 4 Den. (U. S. C. C.) 340. See also *Edge v. Edge*, 62 Ga. 289, where an administrator and another person bought land of the estate, and the administrator settled with the distributees therefor; in an action by him against his co-purchaser for his share of the purchase-money, it was held that the statute began to run from the date of the sale, and not from the ratification by the distributees.

tract for the sale of lands, no time is fixed for a conveyance, the statute does not begin to run against the purchaser, as to the money paid, until he has demanded a deed or the other party has died,¹ the rule being that the statute does not begin to run against a person who has paid money under a voidable contract until some act has been done by the other party, or by the person paying the money, evincing an intention to rescind the contract.²

SEC. 154. Sheriffs, Actions against, for Breach of Duty. — The statute does not begin to run against a sheriff for moneys collected on an execution until a demand has been made upon him therefor, or until he has made a proper return of the execution as required by law,³ or, if no return has been made, until the lapse of the time within which, by law, the return is required to be made. But in Georgia it has been held that the statute begins to run from the time the money was received.⁴ But this doctrine can hardly be regarded as well founded, because the sheriff has the whole period fixed by law within which to make his return, and until that time has elapsed the creditor has no means of knowing whether the sheriff intends to pay over to him the money collected, or not; nor, until the return-day has passed, can he maintain an action against him either for not collecting, or for refusing to pay over the money when collected. In Louisiana it is held that the statute does not begin to run in such cases until the judgment creditor has demanded the money.⁵ For money collected by a sheriff on foreclosure proceedings, the statute does not begin to run until the sale is perfected by a delivery of the deed.⁶ For not returning an execution on time, the statute begins to run the moment the time for returning expires, without demand or notice.⁷ The cause of action against a sheriff for damages occasioned by his unauthorized release of property attached on mesne process does not arise from the date of the release, but from the date of the judgment, and the statute begins to run from that time.⁸ In

¹ *Eames v. Savage, ante.*

² *Collins v. Thayer*, 74 Ill. 138.

³ *Governor v. Stonum*, 11 Ala. 679; *State v. Minor*, 44 Mo. 373. Where an officer receives from an execution debtor a note in satisfaction thereof, payable to himself, the statute does not begin to run against the judgment creditor's right to recover of him the proceeds of such note, until the creditor has made a demand upon the officer therefor, especially where the note remained uncollected until a short time before demand. *Childs v. Jordan*, 106 Mass. 321, and the same rule prevails as to money collected on an execution by an officer. *Weston v. Ames*, 10 Met. (Mass.) 244. An officer who sells an

equity of redemption upon execution, and holds the surplus, upon a second attachment, which has since failed, is not liable to the judgment debtor for such surplus until he has received notice of the dissolution of the second attachment; consequently the statute does not begin to run in his favor until such notice is given. *King v. Rice*, 12 Cush. (Mass.) 161.

⁴ *Thompson v. Central Bank*, 9 Ga. 418; *Edwards v. Ingraham*, 31 Miss. 272.

⁵ *Fuqua v. Young*, 14 La. An. 216.

⁶ *Van Nest v. Lott*, 16 Abb. Pr. (N.Y.) 180.

⁷ *Peck v. Hurlburt*, 46 Barb. (N. Y.) 559.

⁸ *Lessem v. Neal*, 53 Mo. 412.

an action against a sheriff for an escape, the statute begins to run from the time of the escape.¹ For making an insufficient return on mesne process, by reason of which the plaintiff lost the benefit of the attachment, the statute begins to run from the time the writ was returned to the proper officer, and not from the time when the damage therefrom accrued; ² and this is also the rule where he attaches insufficient property on the original writ, when he was directed to, and might have attached sufficient.³ But for taking insufficient bail it is held that the

¹ *Rosborough v. Albright*, 4 Rich. (S. C.) 39; *West v. Rice*, 9 Met. (Mass.) 564; *French v. O'Niel*, 2 H. & M. (Md.) 401; *Cockram v. Welby*, 2 Mod. 222.

² *Miller v. Adams*, 16 Mass. 456; *Caesar v. Bradford*, 13 id. 169. But in *Bank of Hartford County v. Waterman*, 26 Conn. 324, it was held, in a case where an officer made a false return, that the statute did not begin to run until the plaintiff had sustained actual damage therefrom. But ELLSWORTH, J., dissented from this doctrine, and maintains his position in a very strong and able dissenting opinion.

Newell v. Whigham, 102 N. Y. 20.

A sheriff's return to a writ of possession is not conclusive as to the execution of the writ.

As against a mortgagee of a leasehold interest, who is not in possession of the demised premises, to set the six months' statute of limitations running, and to cut off his right to redeem, the execution of a writ of possession, issued in an action of ejectment brought by the landlord because of non-payment of rent, must be an open, visible, and notorious change of possession; a mere nominal and secret execution of the writ is not sufficient.

In an action to foreclose a mortgage upon a leasehold interest, in which the assignee of the landlord defended on the ground that the mortgage had been cut off by the execution of a writ of possession in an action of ejectment brought by the landlord for non-payment of rent, and by a failure of the mortgagee to redeem within six months, it appeared that the deputy of the sheriff, to whom the writ was issued, went upon the premises and notified W., the assignee of the lease, who was in possession, of his business; he did not go into the house upon the premises; W.'s family

were there at the time, and remained there, and he continued in actual occupation thereafter. It did not appear that any person was put in charge or possession on the part of the plaintiff in the ejectment suit, or that W., or any person on the premises, attorned to the plaintiff or to any one in his behalf, or undertook to hold for or under him. The sheriff made return that he had executed the writ by delivering possession to the plaintiff in the ejectment suit. Held, the evidence did not justify a finding that the writ was executed.

Witbeck v. Van Rensselaer, 64 N. Y. 27, distinguished.

The complaint set forth the recovery of judgment in the ejectment suit, and alleged a tender and payment into court of the amount of rent in arrear, with the costs and charges to which the plaintiff in that action was entitled; also that the plaintiff here was ready and willing to pay said rent and charges. It was claimed by the defendants that no effort to redeem was effectual, as the amount tendered was insufficient, and that, therefore, the complaint was properly dismissed. Held, untenable, that as the statutory limitation as to time to redeem had not expired at the time of trial, the insufficiency of amount tendered did not authorize a dismissal of the complaint; that as the complaint contained an offer to pay all the back rents, costs, and charges, the court could have required the payment of the proper amount as a condition of granting relief.

³ *Betts v. Norris*, 21 Me. 314. The doctrine of this case has been denied in a Connecticut case, *Bank of Hartford County v. Waterman*, 26 Conn. 324, the facts in which, as well as the opinion of the court, are given elsewhere; but the courts of Maine adhere to the doctrine of the prin-

statute does not begin to run until a return of *non est inventus* has been made on the execution. The distinction being that the persons becoming bail only guarantee that the debtor shall be forthcoming to respond to the execution, and do not become liable to pay the debt except upon failure in that respect, consequently no right of action exists in favor of the creditor until it is ascertained that the debtor is not forthcoming upon the execution;¹ and the same rule prevails in actions for taking insufficient receptors for property attached or sureties in replevin suits.² For a failure by a sheriff to return goods attached on mesne process to the debtor, after the plaintiff in such process has been defeated, the statute does not begin to run until the attachment is dissolved by the act of the plaintiff therein or by operation of law.³

SEC. 155. Fraudulent Representations in Sales of Property. — In an action to recover damages for fraudulent representations made in the sale of lands, in regard to incumbrances, the cause of action arises at once upon the completion of the sale by a conveyance of the land.⁴ In such cases, the fact that the grantee did not discover the fraud until six years after the conveyance is of no consequence, as it is the misrepresentation and not the resulting damage which constitutes the ground of action; and, as the fraud might have been discovered by an examination of the proper records, the fault is the grantee's, if he has failed to use that diligence which common prudence suggests in ascertaining the truth. The distinction between that class of cases where the fraud ought to have been known to a person, and one where ordinary diligence would not necessarily have discovered it, is well exemplified in the case cited *supra*.

There is also a wide distinction between a case where the action is predicated upon the fraud of a party in the sale of property, or where he has fraudulently thrown a person off his guard, and prevented such an investigation as would have revealed the truth, and one which is predicated upon a breach of contract of warranty, however false the warranty may be. In the former case the statute would not begin to run until the fraud was, or reasonably could have been, discovered; while in the latter case the statute begins to run at once, although there

principal case. *Garlin v. Strickland*, 27 Me. 148.

¹ *West v. Rice*, 9 Met. (Mass.) 564; *Rice v. Hosmer*, 12 Mass. 127; *Caesar v. Bradford*, 13 id. 169; *Mather v. Green*, 17 id. 60. An action against a sheriff for taking insufficient bail accrues from the time of the return of *non est inventus* on the execution against the principal, and the statute runs from that time. *Rice v. Hosmer*, 12 Mass. 127; *West v. Rice*, 9 Met. (Mass.) 564; *Mather v. Green*, 17 Mass. 60. And an action against him for an insufficient return on an original writ

begins to run from the time when the writ was returned. *Miller v. Adams*, 16 Mass. 456.

² *Harriman v. Wilkins*, 20 Me. 93.

³ *Bailey v. Hall*, 16 Me. 408.

⁴ *Northrop v. Hill*, 61 Barb. (N. Y.) 136. In *Owen v. Western Savings Fund*, 97 Penn. St. 47, it was held that the statute begins to run against a recorder of deeds for a false certificate of search from the time when the search was given, and not from the time when damage was sustained.

was no means by which the vendee could have ascertained the falsity of the warranty. Thus, in a New York case¹ it appeared that the defendant was engaged in the business of raising fruit-trees for sale, and in the spring of 1864 sold the plaintiff one hundred young trees, which he represented to be twenty-ounce apple-trees, which was the kind of trees the plaintiff wanted. The trees were taken and set out by the plaintiff on his farm, and did not bear fruit until the fall of 1870, when it was for the first time possible to discover the truth of the warranty. It was then found that the trees were not twenty-ounce apple-trees, but rather trees producing a very inferior kind of apple. The plaintiff then brought an action against the defendant for a breach of the implied warranty, and the statute of limitations having been pleaded, the principal question was whether the statute began to run from the date of sale, or from the time when the plaintiff first discovered that the trees were not of the kind which they were represented to be. The court held that, as there was a breach of the contract as soon as the sale was completed, the statute began to run from that date, and consequently that the action was barred. "I am of the opinion," said MULLIN, P. J., "that there was a warranty by the defendant, either that the trees sold the plaintiff were twenty-ounce trees, or that they would bear twenty-ounce apples. If the former was the warranty, the right of action accrued immediately. If the latter, the right of action did not accrue until 1870, and was not barred. . . . When the defendant delivered to the plaintiff the one hundred trees, he declared them as being twenty-ounce apple-trees at the time of the sale. The meaning, doubtless, was, that they would bear twenty-ounce apples. And a warranty that they would bear that species of apples would be prospective in its operation; the other was to the then present description of the trees. If the trees were not the kind represented, the warranty would be broken in the one case as soon as made in the other, not until they bore fruit of a different kind. The latter form of warranty would not be as a warranty that the trees would bear fruit; but that, if they did bear, they would be of the species known as twenty-ounce apples. It seems to me we must hold the warranty to be as to the species of the trees at the time of the sale, and that a cause of action then accrued, and is of course barred. There is apparent injustice in requiring a plaintiff to bring an action before it was in his power to show that he had been damnified. This result might have been avoided by requiring a warranty that the trees would bear the kind of fruit wanted.

"Inability to ascertain the quality or condition of property warranted to be, at the time of sale, a particular quality or in a certain condition, has never been allowed to change the rule as to the time when a right of action for a breach of warranty occurs."²

¹ *Allen v. Ladd*, 6 Lans. (N. Y.) 222. *Troop v. Smith*, 2 Johns. (N. Y.) 33;

² *Bartly v. Faulkner*, 3 B. & Ald. 288; *Leonard v. Putney*, 5 Wend. (N. Y.) 80;

SEC. 156. When Leave of Court to sue is necessary. Effect of, on Commencement of Limitation. — When an action cannot be brought until leave to sue is granted by a court, especially when this preliminary is imposed by statute, the statute of limitations does not begin to run upon the cause of action until such leave has been granted;¹ although, if a party has slept upon his rights unreasonably, and has neglected to make application to the court for leave to sue for such a period of time that his demand may fairly be regarded as stale, it would seem to furnish ample ground for a refusal by the court of the necessary leave to use its process to enforce the claim. It would be exceedingly unreasonable to hold that the statute runs upon a claim when the party has no power to maintain a suit thereon, and although formerly perhaps a contrary rule would have been held, yet, according to the tendency of the courts at the present time, there can be no question that the Minnesota case expresses the true rule.

SEC. 157. Orders of Court. — The statute ordinarily begins to run against an order of a court from the time when it is made, but when such order partakes of the nature of an interlocutory decree, the statute does not begin to run against it until the proceedings are at an end. Especially is this the case in relation to orders of probate courts, made during the progress of administration, upon which it is held that the statute does not begin to run until the time of final settlement.²

SEC. 158. Property obtained by Fraud. — When property is obtained by fraud, so that a present right of action arises either for the tort or for the value of the property under an implied contract, the statute begins to run from the time when the fraud was, or by the exercise of reasonable diligence might have been, discovered; and even though the statute may have run against the tort, yet an action upon the implied contract may be maintained, unless the statute has also run upon it. Thus, where the maker of an overdue note induced the payee to surrender it to him without payment, by fraud, it was held equivalent to obtaining so much money, and that the creditor might waive the tort and maintain an action for money had and received; and that the statute did not begin to run until the fraud was actually discovered, or the lapse of a reasonable time within which the plaintiff should have discovered it.³

SEC. 159. Promise to marry. — A promise to marry, especially where the parties thereto, through a period of several years, do no act to indicate an intention or purpose not to fulfil it, is treated as a continuous promise, and the statute does not begin to run thereon until there is a breach thereof, either by one of the parties having put it out of his or

Argoll v. Bryant, 1 Sandf. (N. Y. S. C.)
98; Allen v. Miller, 17 Wend. (N. Y.)
202.

¹ Wood v. Myrick, 16 Minn. 494.

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² Tindall v. McMillen, 33 Tex. 484.

³ Penobscot R. R. Co. v. Mayo, 67
Me. 470. See also Outhouse v. Outhouse,
13 Hun (N. Y.), 130.

her power to perform it by marrying another person, or by notice of a purpose not to perform it, or an absolute refusal to perform it.¹ That is, the party setting up the statute as a defence to an action upon such a contract must, in order to avail himself of its protection, show that the contract was broken by him in such a manner that a present right of action against him thereon has existed for the whole period requisite to establish the statutory bar.²

SEC. 160. Contracts void under Statute of Frauds, Actions for Money paid under. — Where money has been paid under a contract that is void under the statute of frauds, because not in writing, the statute does not begin to run upon an action to recover it back from the time when it was paid, but rather from the time when the other party has done some decisive act evincing an intention to rescind the contract.³ Until that time, no right of action exists; and, as the statute does not attach until a full, complete, and present right of action exists, it follows, of course, that the statute does not begin to run until such right arises, by a refusal of the party to perform the contract under which the money was paid.⁴

SEC. 161. Against Heirs, when Tenancy by Curtesy or Dower exists. — The statute does not begin to run against the heirs of a married woman whose husband survives her, and is entitled to an estate in her lands as tenant by curtesy, until his estate is terminated therein;⁵ and the same rule prevails where there is a tenancy by dower in a husband's lands, the rule being that the statute does not begin to run against a person entitled to an estate in remainder until he or she has a right of possession.⁶

SEC. 162. Actions against Sureties on Administrator's Bonds. — Ordinarily the statute will not begin to run in favor of the sureties on an administrator's bond, by a distributee of the estate, until his administration is closed; but as his death, before the estate is settled, determines his trust, the statute begins to run against the distributees in favor of the sureties, from the date of his death.⁷ In Maryland, under the statute of 1789 the statute of limitations begins to run on a guardian's bond from the time it was passed.⁸

SEC. 163. Actions against Guardians by Wards. — An action by a ward against a guardian for a settlement does not accrue until the relation is terminated;⁹ but if a female ward marries, before she becomes of

¹ *Blackburn v. Mann*, 85 Ill. 222.

² *Id.*

³ *Collins v. Thayer*, 74 Ill. 188.

⁴ *Cairo, &c. R. R. Co. v. Parks*, 33 Ark. 131.

⁵ *Dyer v. Brannock*, 66 Mo. 391.

⁶ *Bailey v. Woodbury*, 50 Vt. 166.

⁷ *Harrison v. Heflin*, 54 Ala. 552; *Biddle v. Wendell*, 37 Mich. 452.

⁸ *State v. Miller*, 3 Gill (Md.), 335.

⁹ *Alston v. Alston*, 43 Ala. 15; *Coplinger v. Stokes, Meigs* (Tenn.), 175. In Louisiana, the action of a minor against his tutor, respecting the acts of his tutorship, is prescribed by four years from the time he becomes of age, and the tacit mortgage given him by law against the property of the tutor is extinguished at the same time. *Alliot v.*

age, with an adult husband capable of suing to enforce her rights, the relation ceases, and the statute begins to run from the date of the marriage.¹ A right of action does not accrue to a guardian to recover of his ward for expenses incurred, until the termination of the guardianship; and the rule is not changed, or his rights in this respect affected, by the circumstance that the ward removes to another State before he becomes of age.² When a guardian is removed from his trust, and, subsequently thereto, sales made by him are set aside, and he is compelled to refund the money received therefrom, the statute begins to run from the time the sales are set aside and the money refunded, and not from the time of settling his guardianship account.³

SEC. 164. **Assessments, Taxes, &c.** — Where an assessment or tax is laid, and by ordinance or statute a certain time is fixed within which it may be paid, the person against whom it is laid has the whole of such period within which to pay it, and the statute does not begin to run thereon until such time has expired. Thus, where an assessment was imposed by an ordinance which provided that, unless paid within twenty days, the debtor should be subjected to penalty and interest, it was held that the statute began to run from the expiration of the twenty days;⁴ and the same rule applies in the case of taxes. If the

Anbert, 20 La. An. 509. If a person, without legal authority to do so, assumes to act as guardian for another, and as such receives money belonging to the ward, the statute begins to run against him at once, unless there is some existing disability. *Johnson v. Smith*, 27 Mo. 591.

¹ *Finnell v. O'Neal*, 13 Bush (Ky.), 176.

² *Taylor v. Kilgore*, 33 Ala. 214.

³ *Shearman v. Akins*, 4 Pick. (Mass.) 283. In *Henderson v. Henderson*, 54 Md. 332, it was held that the statute begins to run upon a guardian's bond immediately upon the ward becoming of age. "From the moment the ward is emancipated from the authority of his guardian, by reaching the age prescribed by law, his cause of action is complete, and the statute of limitations begins to run." *Dorsey, J.*, in *Green v. Johnson*, 3 G. & J. (Md.) 87. See also *Munroe v. Phillips*, 65 Ga. 396. In *Henderson v. Henderson*, *ante*, *IRVING, J.*, in remarking upon the provision of the code providing that "on the ward's arrival at age" the guardian shall pass his account and pay over the moneys in his hand, says, "So long as he (the guardian) delayed, it was not a new breach, but a continuing default and a continuing breach." From the doctrine advanced by

the court, *ALVEY, J.*, dissented, and very ably combated the view that the statute begins to run instanter upon the ward becoming of age, and insisted that the statute did not begin to run until the balance due had been ascertained by a settlement of his accounts in the Orphan's Court; citing *Thurston v. Blackiston*, 35 Md. 501; *Byrd v. Stewart*, 44 id. 492; *Griffith v. Park*, 32 id. 1, 8; *Sanders v. Coward*, 15 M. & W. 48.

⁴ *Reynolds v. Green*, 27 Ohio St. 416.

In *White v. City of Brooklyn*, 122 N. Y. 53, the plaintiff had certain certificates of sale, issued by the collector of taxes and assessments in the city of Brooklyn, on sales of land made in and prior to 1864, for unpaid taxes and assessments. Each certificate contained a statement that the purchaser was entitled, after the expiration of two years from its date, to a lease of the premises sold, unless redeemed or an irregularity should be discovered in the proceedings prior to the sale, in which case it was agreed that the purchase price should be refunded to the purchaser or assigns upon surrender of the certificate. No redemptions and conveyances in pursuance of the certificates were ever made. Certain of the certificates the plaintiffs claimed to

statute or the note under which it was raised specifies a certain time within which it shall be paid, the taxpayer has the whole of that period

own as assignees of the purchasers. The only evidence of the assignment of three of the certificates was by the indorsement of the purchaser's name on the certificate. No notice of any assignment had been filed as required by statute, which provides that "no assignment of any certificate given on the sale of lands for any taxes or assessments, shall have any effect until notice of the same, with the name and residence of the assignee, shall be filed in the office of the collector of taxes and assessments in the district in which said lands are situated." In December, 1882, irregularities were discovered in the proceedings prior to the sales, which rendered them invalid. In July, 1883, the plaintiffs demanded repayment of the purchase-moneys, which was refused. In an action to recover the same brought thereafter, the court below held that the action was barred by the statute of limitations. It was held error; that the contracts on the part of the city embodied in the certificates continued effectual and unperformed until the discovery of the irregularities in the proceedings, and the plaintiffs' right to the repayment of the purchase-moneys then arose; and that plaintiffs were not entitled to recover interest prior to the time demand of payment was made, nor to recover anything by way of indemnity for costs incurred by them in defending an action in which was involved the validity of the certificates as liens.

Also, that while the defendant might, for the purpose of performance of the contracts contained in the certificates, have treated the purchasers, as the parties entitled to the benefit of them until notice was filed, the provision was no defence in this action, as an assignment of the certificates would be in practical effect an assignment of the claims against the city for reimbursement; but that the certificates were not negotiable instruments transferable simply by indorsement; and that the indorsements alone were insufficient evidence to establish title in plaintiffs to the three certificates.

In *Reid v. Board of Supervisors of Albany Co.*, 128 N. Y. 364, reversing 60

Hun, 215, it was held, that under the provisions of the act providing "for the assessment and collection of taxes in the city of Albany" which, in case a purchaser at a tax sale shall be unable to recover possession of the real estate because of error or irregularity in the proceedings for the levying or collection, requires the Board of Supervisors of the county to reimburse the purchase-money, and upon the refusal or neglect to do so, authorizes the recovery of the money in an action against the Board, when, in consequence of some defect in the proceeding, a sale is invalid, and because thereof the purchaser is unable to recover possession, he is at once entitled to reimbursement, and his cause of action is barred, if suit is not brought in six years from the time when the right to make a demand for reimbursement was complete.

In an action under said provision to recover back the purchase-money paid on various tax sales, all of which were made in and prior to 1883, and more than seven years before the commencement of the action, it was not alleged in the complaint, or shown upon the trial, that any legal proceeding had been instituted by the purchaser, or his successor in interest, to recover possession of the land, or that he had made any effort to obtain possession, but it was admitted that by a decision of this court, *Remsen v. Wheeler*, 105 N. Y. 573, rendered four years after the sale in an action between other parties, sales under similar proceedings in another locality were adjudged illegal and void. The court below decided that neither the purchaser nor plaintiff, his successor in interest, was entitled to bring an action for reimbursement until such decision, and so that the action was not barred by the statute. Held, error; that the decision had no effect upon and in no way changed the rights, duties, or obligations of the parties here, but was simply an authority as to the law; and said provision requires that before a recovery can be had in such an action, plaintiff must show an effort on the part of the purchaser to obtain possession under the tax sale, and that he was unable to do so because of its invalidity;

to pay it in, and the statute does not begin to run until such period has elapsed.

SEC. 165. Agreement to pay Incumbrances. — Where the grantee of land assumes and agrees to pay certain incumbrances on the land, and no time is fixed within which he shall pay them, he is treated as contracting to pay them as they mature; and in such a case, where the incumbrances at the time the deed is delivered have not matured, the statute would not begin to run upon his contract until such incumbrances became due; but if they are due at the time the contract is made, the statute begins to run in his favor from the time when he accepted the

it is not sufficient to show merely that the sale was illegal.

The purchaser is not bound to bring an action, or to institute a proceeding, such as is authorized by the act; if he demand possession of the occupant or owner, and this is refused on the ground of invalidity of the sale, he then may make his demand for reimbursement; in which case, however, he assumes the burden of establishing the invalidity of the sale; and the purchaser must act within a reasonable time after he obtains his certificate; that in case he institutes legal proceedings and conducts them to a determination with reasonable diligence, the statute will begin to run from such termination; and that if he relies upon a demand of possession, and this is shown to have been made within a reasonable time, the statute will begin to run from that time.

The question as to what is a reasonable time, is one of law.

The amendment of said provision made by the act of 1889, which requires the reimbursement to be made "within six years from such sale," is prospective in its character, and so has no effect upon prior sales; said amendment did not repeal the limitations of the code, but left them to apply to the past and simply made a new rule for future cases.

The legislature might have made the amendment retroactive in its character, provided a reasonable time was given to the purchaser to claim and enforce reimbursement after the amendment took effect.

In re Duffy, 133 N. Y. 512.

A petition was brought to vacate an assessment for a local improvement, in the city of New York, was served upon the corporation counsel in April, 1872, with a

notice attached that it would be presented to the court on the twenty-sixth of that month.

The motion was not then made. In November, 1890, another notice of application to vacate the assessment was served. It was held, that this was a new and independent proceeding, in no way connected with the first, and that it was barred by the statute of limitations.

In re Rosenbaum, 119 N. Y. 24, distinguished.

In *People ex rel. v. Wemple*, 133 N. Y. 617, it was held that there is no limitation as to the time in which a corporation may apply to the comptroller for a revision of a tax levied upon it, under the provision of the act providing for the taxation of certain corporations as amended in 1889, which authorizes that officer to revise and readjust tax accounts against corporations theretofore settled.

No power is conferred upon the comptroller by said provision, or upon the court in reviewing his decision as authorized by it to direct the refunding of any tax paid into the State treasury pursuant to the act. All that the comptroller may do is to settle the account and charge or credit to the corporation, as the case may require, the difference, if any, resulting from the revision, "upon the current account." Upon review by the court it may give no judgment that the comptroller might not have given.

It seems that in case the corporation is not liable to taxation, and so has no account with the comptroller, it is for the legislature to carry out the decision of the comptroller or the court by making an appropriation to refund the illegal tax.

deed.¹ Where, however, the grantor is to pay the incumbrances, the statute does not begin to run against the grantee's right to recover back his purchase-money, &c., until he has been evicted in consequence of the non-payment of the incumbrances by the grantor.²

SEC. 166. General Provisions. — In many of the statutes, after specifically providing for certain classes of actions, there is a general provision, by which it is provided that all causes of action not limited by any previous sections of the statute shall be brought within a certain period. Thus, in Maine,³ it is provided that "all personal actions on any contract, not limited by the foregoing sections, or any other law of the State, shall be brought within twenty years after the accruing of the cause of action;" and a similar provision exists in Massachusetts,⁴ Michigan,⁵ and Wisconsin.⁶ In Ohio,⁷ it is provided that all other actions not enumerated in the statute shall be brought within four years after such right of action accrued. This clause is sweeping, and embraces every species of action, whether upon a contract, bond, deed, or other obligation, or for any act, wrong, or injury not specially provided for. In Oregon, an equally sweeping clause exists, which limits non-enumerated causes of action to ten years;⁸ so also in Nevada⁹ and Nebraska,¹⁰ the limitation being four years.

SEC. 167. For Advances upon Property. — Where money is advanced upon property in store, the property is treated as the primary fund for the repayment of the advances; and, as an action for the money can only be brought when the consignee can no longer look to the property for reimbursement, it follows as a matter of course that the running of the statute dates from the same period.¹¹

SEC. 168. Usurious Interest. — Where a contract is usurious, and the usurious interest is paid in advance at the time when the contract is made, the statute begins to run against the person paying it, and against the State, where it is made an indictable offence at once, and does not rest in abeyance until the debt is paid;¹² but the rule as to an action to recover back the money would be otherwise where the usurious interest is not paid until the debt matures. In no event can a right of action accrue until the interest is paid.

SEC. 169. Between Tenants in Common of Property. — Where property belonging to two persons is sold by one of them, the statute does not begin to run from the time of sale, but from the time when the pay therefor is received. Thus, in an action by one tenant in common against his co-tenant for the proceeds of trees sold by him, it was held that the statute began to run from the time of payment, not of sale;

¹ *Schumacker v. Sibert*, 18 Kan. 104.

² *Taylor v. Barnes*, 69 N. Y. 430.

³ Appendix, Maine.

⁴ Appendix, Massachusetts.

⁵ Appendix, Michigan.

⁶ Appendix, Wisconsin.

⁷ Sec. 1, subd. 6.

⁸ Appendix, Oregon.

⁹ Appendix, Nevada.

¹⁰ Appendix, Nebraska.

¹¹ *Grimes v. Hapgood*, 27 Tex. 693.

¹² *Com. v. Frost*, 5 Mass. 53.

and that if a note was taken upon which the purchaser from time to time made payments, the statute begins to run from the date of each payment.¹

SEC. 170. When the Law gives a Lien for Property sold. — In the case of a sale of property consisting of several parcels, under a special contract, where the law gives a lien therefor, as in the case of a sale of goods to a vessel, the lien attaches on the day of the delivery of the first parcel, but the statute does not begin to run until the day after the delivery of the last parcel.² Of course, if a term of credit is agreed upon, the statute does not attach until the credit has fully expired.

SEC. 171. Co-purchasers, Co-sureties, &c. — Where one of two or more persons who have become jointly liable under a contract or obligation, whether partners or not, pays the whole or a portion of the debt, the statute attaches from the time of each payment by him ;³ but this rule is, of course, subject to the exception, that, if the payment is made before the debt becomes due, the statute will not apply until its maturity. It has been held that, even where the liability of one joint maker of a note is barred by the statute, but has been kept or foot as against the other by partial payments made by him, he may nevertheless recover of the other a moiety of the amount so paid by him, unless the statute has also run against such payments ;⁴ and this doctrine is well grounded in principle and sustained by authority,⁵ the rule being that the statute only begins to run from the date of each payment.⁶

¹ *Miller v. Miller*, 7 Pick. (Mass.) 182; *Brown v. Agnew*, 6 W. & S. (Penn.) 235; *Sherwood v. Dunbar*, 6 Cal. 58;

² *The Mary Blane v. Bechler*, 12 Mo. 477; *Lomax v. Pendleton*, 3 Call (Va.), 542; *Buck v. Spofford*, 40 Me. 328; *Regis v. Herbert*, 16 La. An. 224.

³ *Campbell v. Calhoun*, 1 Penn. 140.

⁴ *Peaslee v. Breed*, 18 N. H. 489.

⁵ *Bullock v. Campbell*, 9 Gill (Md.), 182.

⁶ *Bullock v. Campbell*, 9 Gill (Md.), 182.

CHAPTER XIV.

SPECIALTIES.

SEC. 172. Sealed Instruments.

173. Covenants, Quiet Enjoyment,
&c.174. Covenants of Warranty, against
Incumbrances, &c.

SEC. 175. Bonds.

176. Effect of Acknowledgment of
Payment on Specialties.

SEC. 172. **Sealed Instruments.** — In all those States where sealed instruments, or “specialties,” as they are technically called, are expressly brought within the statute,¹ the statute begins to run from the time when a cause of action arises thereon, and the bar is complete at the expiration of the statutory period, while in those States where this class of instruments are not provided for, the common-law presumption of payment attaches from the time when a cause of action arises, and becomes complete as a presumptive bar at the expiration of twenty years from that time;² and the mere lapse of twenty years without any demand, of itself raises a presumption of payment.³ The statement of the

¹ See *ante*, pp. 64–78, for instances in which such statutes have been adopted in different States.

² *Bass v. Williams*, 8 Pick. (Mass.) 187; *Jackson v. Sackett*, 7 Wend. (N. Y.) 94; *Oswald v. Leigh*, 1 T. R. 271.

³ *Wannamaker v. Van Buskirk*, 1 N. Y. Eq. 685; *Mease v. Smith*, 1 N. J. L. 443; *Evans v. Huffman*, 5 N. J. Eq. 354; *Moore v. Smith*, 81 Penn. St. 182; *Henderson v. Lewis*, 9 S. & R. (Penn.) 379. But in Vermont, where, by statute, the prescriptive period is fifteen years, such a presumption is raised from the lapse of that period. *Whitney v. French*, 25 Vt. 663. In *Oswald v. Leigh*, *ante*, a bond given in 1765 was sued in 1784, nineteen years and a half after it was given, and, as both parties resided in Great Britain and were men of means, it was insisted that the lapse of this period of time without demand raised a presumption of payment, and the cases of *Rowley v. Tompkins*, tried in 1766; *Welden v. Davis*, tried in 1760; and *Moyle v. Roberts*, all manuscript cases,

—were cited in support of this position; but *BULLER, J.*, having instructed the jury in favor of the plaintiff, upon a rule to show cause obtained by the defendant, said: “I have always been of opinion that no less time than twenty years could of itself form a presumption that a bond had been paid, and, as there was no evidence at the trial in aid of the presumption, I left the question to the jury with strong directions in favor of the plaintiff; for, even with regard to the rule of twenty years, where no demand has been made during that time, that is only a circumstance for the jury to found presumption upon, and is in itself no legal bar. In those cases where satisfaction of a bond has been presumed within a less period, some other evidence has been given in favor of such a presumption; such as having settled an account in the intermediate time, without any notice having been taken of such a demand.

“It is manifest that this doctrine of twenty years’ presumption was first taken

law by BULLER, J., in the case last cited, is generally adopted in this country; and mere lapse of time less than twenty years does not afford

up by LORD HALE, who only thought it a circumstance from which a jury might presume payment. In this he was followed by LORD HOLT, who held, that if a bond be of twenty years' standing, and no demand proved thereon, or good cause of so long forbearance shown on *solvit ad diem*, he should intend it paid. 6 Mod. 22. This doctrine was afterwards adopted by LORD RAYMOND in the case of *Constable v. Somerset*, Hil. 1 Geo. II. at Guildhall. That was debt upon bond, where the defendant, an executor, craved oyer of the bond, and of the condition, which appeared to be for the payment of so much money, six months after the death of the defendant's testator. The defendant in his plea averred that the testator died on the 15th March, 1711, and that he had paid the said sum on the 16th March, 1711, within six months after the testator's death, and thereupon issue was joined. The defendant relied on the ground that, as he, after the death of the testator, his father, had an estate in the plaintiff's neighborhood, and was constant and regular in all his payments, it should be presumed that the money was paid to the plaintiff. In answer to this objection, evidence was given of a demand of the money on the defendant himself in 1725; and the Chief Justice said, that the presumption of money having been paid which was due on bond, if it were put in suit after twenty years' standing, was not the old but a new doctrine, which had been introduced in LORD HALE's time, and that he would never suffer a plaintiff to be stripped of a just debt by such a presumption as was then contended for.

"This opinion seems to fortify the idea which I took up at the trial, in answer to a dictum which was then cited (1 Burr. 424), that the question of presumption of payment within a less time than twenty years had been left to a jury, which was that it must have been left to them upon some evidence; and in such case the slightest evidence is sufficient. In one of the *Winchelsea* cases (4 Burr. 1968), LORD MANSFIELD expressly said, that, if a bond had lain dormant for twenty years, it shall be presumed to be paid. The court, how-

ever, inclining to believe the real truth of the case was with the defendant, desired that he would make an affidavit; which being read upon a subsequent day, and not proving satisfactory, they discharged the rule. And LORD MANSFIELD, C. J., said that there was a distinction between length of time as a bar, and where it was only evidence of it: the former was positive, the latter, only presumptive; and he believed that in the case of a bond no positive time had been expressly laid down by the court; that it might be eighteen or nineteen years."

But in this country it is generally held that no period short of twenty years will raise a presumption of payment of a bond, *Clark v. Bogardus*, 2 Edw. (N. Y.) Ch. 387; or of a mortgage, *Doe v. Grafton Bank*, 19 Vt. 463; *Meyer v. Pruger*, 7 Paige (N. Y.) Ch. 465; *Ingraham v. Baldwin*, 9 N. Y. 45; or a covenant of any kind, *Johnson v. Stockton*, 6 B. Mon. (Ky.) 408. Eighteen years and a half has been held not sufficient as to a bond, *Baltz v. Bullman*, 1 Yeates (Penn.), 584; *Lesley v. Nones*, 7 S. & R. (Penn.) 410; *Hughes v. Hughes*, 54 Penn. St. 240. Such a presumption may, in connection with other circumstances, be raised by the lapse of a less period, *Moore v. Smith*, 81 Penn. St. 182; *Henderson v. Lewis*, 9 S. & R. (Penn.) 379; but to have that effect it must be aided by persuasive circumstances, *Hughes v. Hughes*, *ante*.

Courts of equity act in analogy to the statute of limitations; and if, in a suit for the foreclosure of a mortgage, the lapse of time be such that the orator could not maintain a suit at law for the recovery of the mortgaged premises, a court of equity would presume payment and satisfaction of the mortgage debt. This period is fixed, by statute, in Vermont, at fifteen years. *Martin v. Bowker*, 19 Vt. 526. See also *McDonald v. Sims*, 3 Kelly (Ga.), 883; *Field v. Wilson*, 6 B. Mon. (Ky.) 479. But the payment of interest upon the debt, by the defendant, or of any portion of the principal, or any other act recognizing the existence of the mortgage, and that it was unsatisfied and obligatory

any ground for a presumption of payment or satisfaction of a specialty, whether it be a bond,¹ mortgage,² judgment,³ legacy,⁴ notes under seal,⁵ or any instrument in the nature of a specialty,⁶ as recognizances, rent reserved in deeds,⁷ or arrears of ground-rent, taxes on leased lands;⁸

upon him, would be sufficient to repel the presumption of payment, and take the case out of the operation of the statute. *Martin v. Bowker*, 19 Vt. 526.

¹ *Diamond v. Tobias*, 12 Penn. St. 312; *Brubaker v. Taylor*, 76 id. 83; *Moore v. Smith*, 81 id. 182; *Clark v. Bogardus*, 2 Edw. (N. Y.) Ch. 387; *Miller v. Smith*, 14 Wend. (N. Y.) 425. That this presumption does not avail in less than twenty years as to any specialty, see *Meyer v. Pruyn*, 7 Paige (N. Y.) Ch. 465, and this was held as to bonds. *Clark v. Bogardus*, 2 Edw. (N. Y.) Ch. 387. A lapse of eighteen years and a half was held not sufficient to raise a presumption that a bond was void, *Baltz v. Bullman*, 1 Yeates (Penn.), 584; *Hughes v. Hughes*, 54 Penn. St. 240; *Dehart v. Gard*, Add. (Penn.) 344; *McCarthy v. Gordon*, 4 Whart. (Penn.) 321; *Lesley v. Nones*, 7 S. & R. (Penn.) 410; nor will the lapse of any time, short of twenty years, *per se* raise such a presumption. *Henderson v. Lewis*, 9 S. & R. (Penn.) 87. Twelve years was held insufficient. *Kinna v. Smith*, 3 N. J. Eq. 14; *Rogers v. Burns*, 27 Penn. St. 525. And this includes all species of bonds, official or otherwise, where the statute provides no special period of limitation, *Backentoss v. Cam*, 8 Watts (Penn.), 286; *Deimer v. Sechrist*, 1 Polk (Penn.), 325; or recognizances, *Ankeney v. Penrose*, 18 Penn. St. 190; *Darlington's Appropriation*, 13 id. 430; *Allen v. Sawyer*, 2 P. & W. (Penn.) 325; *Galbraith v. Galbraith*, 6 Watts (Penn.), 112.

² *Flagg v. Ruden*, 1 Bradf. (N. Y. Surr.) 192; *Bunder v. Snyder*, 5 Barb. (N. Y.) 63; *Reynolds v. Green*, 10 Mich. 355; *Howland v. Shurtleff*, 2 Met. (Mass.) 26; *Martin v. Bowker*, 19 Vt. 526; *Hoffman v. Harrington*, 33 Mich. 392; *Inches v. Leonard*, 12 Mass. 379; *Donald v. Sims*, 3 Kelly (Ga.), 383; *Cheever v. Perley*, 11 Allen (Mass.), 584; *Bacon v. McIntire*, 8 Met. (Mass.) 87; *Hughes v. Edwards*, 9 Wheat. (U. S.) 498; *Peck v. Mallam*, 10 N. Y. 509; *Wilkinson v.*

Flowers, 37 Miss. 379; *Newcomb v. St. Peter's Church*, 2 Sandf. (N. Y.) Ch. 636; *People v. Wood*, 12 Johns. (N. Y.) 242; *Collins v. Torrey*, 7 id. 278; *Field v. Wilson*, 6 B. Mon. (Ky.) 479; *Jackson v. Wood*, 12 Johns. (N. Y.) 242; *Giles v. Barmore*, 5 Johns. (N. Y.) Ch. 552; *Cleaveland Ins. Co. v. Reed*, 24 How. (U. S.) 284; *Downs v. Sooy*, 23 N. J. Eq. 55; *Green v. Fricker*, 7 W. & S. (Penn.) 171; or any lien, *Brock v. Savage*, 31 Penn. St. 410. See Chap. XVIII. MORTGAGES.

³ *Miller v. Smith*, *ante*; *Cope v. Humphreys*, 14 S. & R. (Penn.) 15; *Summerville v. Holliday*, 1 Watts (Penn.), 507; *Wills v. Gibson*, 7 Penn. St. 154; *Denny v. Eddy*, 22 Pick. (Mass.) 533. But the presumption does attach until the judgment is complete; that is, until the amount is fixed, both debts and costs. *Wills v. Gibson*, 7 Penn. St. 415.

⁴ *Fouck v. Brown*,¹ 2 Watts (Penn.), 209; *Strahn's Appeal*, 23 Penn. St. 351; *Kingman v. Kingman*, 127 Mass. 249.

⁵ *Rickert v. Gristwite*, 1 Pittsb. (Penn.) 153.

⁶ *Galbraith v. Galbraith*, 6 Watts (Penn.), 112; *Ankeney v. Penrose*, 18 Penn. St. 190; *Allen v. Sawyer*, 2 P. & W. (Penn.) 325.

⁷ *McGuesney v. Heister*, 33 Penn. St. 435; *St. Mary's Church v. Miles*, 1 Whart. (Penn.) 229; or rent reserved by deed, *Barley v. Jackson*, 16 Johns. (N. Y.) 210; *Lyon v. Odell*, 65 N. Y. 28.

⁸ *McLaughlin v. Kain*, 45 Penn. St. 113; *Woodburn v. Farmers' &c. Bank*, 5 W. & S. (Penn.) 447. Municipal assessments are presumed to have been paid by lapse of twenty years. *Ex parte Serrell*, 9 Hun (N. Y.), 283; *Fisher v. New York*, 6 id. 64; *Ex parte Striker*, 71 N. Y. 603. Such assessments are treated as in the nature of judgments, *Mayor v. Colgate*, 12 N. Y. 140. But in New York this species of assessments is confirmed by the courts, and for that reason properly partake of the nature of judgments; but when

and that the consideration named in a deed as received has been paid.¹ And in a Pennsylvania case² where the parties had made a parcel partition of lands, with an agreement for an owelty of partition after the lapse of twenty years, it was held that payment of the same would be presumed; and it may be stated as a general proposition that this presumption attaches to every species of specialty claim. But it must be borne in mind that, unless the instrument or obligation creates a present right of action, the presumption, like the statute, only attaches from the time when the right of action accrued. But being a common-law presumption, even though it is also made so by statute, it may be set up by a defendant, whether he is a resident of the State in which the action is brought or not;³ the distinction being, that where the statutory presumption is relied upon it should be pleaded, while the common-law presumption is a mere matter of evidence, and may be urged at the trial without having been pleaded. There is still another distinction between a presumption raised by the law and one that is prescribed by the statute; and that is, that the latter is absolute, unless made otherwise in terms, while the former is dependent upon a variety of circumstances which (as we have seen) may entirely destroy its force. In New York⁴ the presumption may be repelled by proof of payment of some part, or by a written acknowledgment. In North Carolina,⁵ the presumption is reduced to ten years, except as to mortgages, which is thirteen years, subject to the same rules as exist at common law. In Arkansas⁶ similar provisions exist, except that payment of part, or a written acknowledgment, is necessary to remove the presumption; so also in Missouri,⁷ except that the period is twenty years. In England, by Stat. 3 & 4 Wm. IV. c. 42, specialties are brought within the statute, and are barred in ten years.

SEC. 173. Covenants, Quiet Enjoyment, &c.—There is often a question as to covenants of a more or less continuous nature, such as covenants for title and quiet enjoyment, as to how far in those States where the statute embraces specialties they are within the statute. In an English case,⁸ arising under the statute 3 & 4 Wm. IV., the question was considered at some length by KELLY, C. B., and his observations are quoted here, as they may be of general use.⁹ They were as follows: “There is a distinction between the covenant for title and the covenant for quiet enjoyment. The covenant for title is broken by the existence

they are not required to be so affirmed, they cannot in any sense be said to have any of the attributes of a judgment.

¹ Pryor v. Wood, 31 Penn. St. 142.

² Higgs v. Stimmel, 3 P. & W. (Penn.) 115.

³ Sanderson v. Olmstead, 4 Chand. (Wis.) 190.

⁴ See Appendix.

⁵ See Appendix.

⁶ See Appendix.

⁷ See Appendix.

⁸ Spear v. Green, L. R. 9 Ex. 99.

⁹ Id. 116. It should be observed, however, that the judgment of the majority of the court in the case was different from that of the CHIEF BARON, but principally upon different grounds. The facts of the case sufficiently appear from the judgment. Banning on Limitations, 177–187.

of an adverse title in another, as in this case, by a lease, its mere existence rendering the land of less value.¹ The covenant for quiet enjoyment is broken only when the covenantee is disturbed, as in this case by the entry into the mine and the taking the fragments of coal in 1848.²

¹ The rule may be said to be that if the grantor was not seised, the covenant of seisin is immediately broken. *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1; *Bingham v. Wetherwax*, 1 N. Y. 509; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72; *Grannis v. Clark*, 8 Cow. (N. Y.), 36; *McCarty v. Leggett*, 3 Hill (N. Y.), 134; *Scantlin v. Allison*, 12 Kan. 35; *Coleman v. Lyman*, 42 Ind. 289; *Dale v. Shirley*, 8 Kan. 276; *Salmon v. Vallejo*, 41 Cal. 481. But it was held in *Scott v. Twiss*, 4 Neb. 133, that if the grantor was in exclusive possession under claim of title, the covenant of seisin is not broken until the purchaser or those claiming under him are evicted by title paramount. To constitute a breach, the person claiming title must have had a valid right thereto. *Gerald v. Elly*, 51 Iowa, 321.

² As illustrative of the time when the statute begins to run for breaches of a covenant for quiet enjoyment, it may not be amiss to give instances of acts which constitute a breach. Breaches of this covenant may occur either by a molestation arising from a suit at law or in equity relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the premises. Of the first kind is a recovery by ejectment by a person having a lawful title, or any other suit by which the peaceable occupation of the premises is prevented. Thus, a covenant in a lease that the lessee should quietly enjoy the estate discharged from taxes is broken by a suit for them, although commenced after the expiration of the term. *Laming v. Laming*, Cro. Eliz. 316. But where the breach assigned was, "that the defendant had exhibited a bill in chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with costs," it was held on demurrer to be no breach of covenant; for the covenant was for quiet enjoyment, and this was a suit for waste. *Morgan v. Hunt*, 2 Vent. 215. But a suit in equity that involves the title and estate operates as a breach. *Coulston v. Carr*, Cro. Eliz. 347; *Lanning v.*

Lovering, id. 916; *Morgan v. Hunt*, 2 Vent. 213; *Daerdemay v. Oland*, Cro. Eliz. 768; *Ashton v. Martyn*, 2 Keb. 268. So does a recovery in ejectment. *Cobb v. Wellborn*, 2 Dev. (N. C.) L. 388; *Mitchell v. Warner*, 5 Conn. 522. But *contra*, and holding that it does not constitute a breach, see *Kerr v. Shaw*, 13 Johns. (N. Y.) 236. Or in trespass where the title is involved. *Cobb v. Wellborn*, *ante*. But *contra*, see *Webb v. Alexander*, 7 Wend. (N. Y.) 281. But the language of the covenant must be looked to, and it may be such that a mere judgment in an action involving the title will not operate as a breach. Thus, if the covenant is that "the lessee shall enjoy the premises without lawful eviction" (*Anonymous*, 3 Leon. 71, pl. 100), it has been held that a bill in equity involving the title, brought against the lessor alone, does not operate as a breach. See also *Selby v. Chute*, 1 Rol. Ab. 430, pl. 15. The covenant may be either general or qualified; but in either case it runs with the land. *Campbell v. Lewis*, 8 Taunt. 715; *Noke v. Awder*, Cro. Eliz. 373. Even though the language of the covenants is that, "subject to the payment of the rent and the performance of the covenants," the lessee shall quietly enjoy, yet such words do not constitute a condition precedent, and a recovery may be had by the lessee for a breach of the covenant, although he has not paid the rent or performed his covenants. *Dawson v. Dyer*, 5 B. & Ad. 584; *Allen v. Babbington*, 1 Sid. 280; *Hayes v. Bickerstaff*, 2 Mod. 34; *Anonymous*, 2 Show. 202; *Wakeman v. Waker*, 1 Vent. 294. Any description of annoyance to the occupation of the premises which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort. Thus, if a man covenants that he will not interrupt the covenantee in the enjoyment of premises, the erection of a gate which intercepts them is a breach of the covenant,

The deed of purchase having conveyed to Jameson, and afterwards to

although he had a right to erect it. *Andrews v. Paradise*, 8 Mod. 318. A mere demand of rent by a person having a superior title does not amount to a breach, nor does any act of the lessor that merely amounts to a trespass. There must be either an actual or constructive eviction. *Cowan v. Silliman*, 4 Dev. (N. C.) L. 46; *Mayor v. Mabie*, 13 N. Y. 151; *Valet v. Herner*, 1 Hilt. (N. Y. C. P.) 149; *Lounsbury v. Snyder*, 31 N. Y. 514. Nor does an unlawful act of another disturbing the tenant's possession amount to a breach. There must be a rightful interruption by a paramount title. *Rootin v. Robertson*, 2 Strobb. (S. C.) 366. But there may be an eviction and a consequent breach without a judgment. *Cobb v. Wellborn*, 2 Dev. (N. C.) L. 388; *Stewart v. Drake*, 9 N. J. L. 189; *McGary v. Hastings*, 39 Cal. 360; *Grist v. Hodges*, 3 Dev. (N. C.) L. 200. Such a covenant may be said to be broken whenever there has been an involuntary loss of possession by the hostile assertion of an irresistible title, whether with or without judgment, or whether an actual dispossession has transpired or not. It is enough if the title is paramount, and is asserted so that the tenant must either quit possession or yield to it. *McGary v. Hastings*, 39 Cal. 360. So if, after a demise of mines containing the usual covenant for quiet enjoyment, the lessor digs a quarry over the mines, and makes holes, through which water percolates and escapes into the mines, although he had a legal right to work the quarry, his doing so in such a manner amounts to a breach of the covenant for quiet enjoyment of the mines. *Shaw v. Stenton*, 2 H. & N. 858. An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity, *Morris v. Edgington*, 3 Taunt. 24; or of a way by grant from the covenantor, *Pomfret v. Ricroft*, 1 Saund. 322. It must be remembered, however, that the act done must be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained. *Sedden v. Senate*, 13 East, 72. A covenant for quiet enjoyment does not oblige the lessor to rebuild or repair, in case the buildings are destroyed or injured by fire, tem-

pest, or otherwise, as there is no implied obligation upon a landlord to keep the premises tenantable. *Brown v. Quilter*, Ambler, 620. The covenant only extends to lawful interruptions, whether the word "lawful" is used in the covenant or not. *Foster v. Pierson*, 4 T. R. 617; *Dudley v. Falliot*, 3 id. 584; *Major v. Grigg*, 2 Mod. 213. And an allegation of a breach that does not show an interruption by title is bad. *Rantin v. Robertson*, 2 Strobb. (S. C.) 366; *Mayor v. Mabie*, 13 N. Y. 151; *Perry v. Edwards*, 1 Strange, 400; *Nicholas v. Pullin*, 1 Lev. 83; *Holmes v. Seller*, 3 id. 305; *Bailey v. Hughes*, W. Jo. 242; *Hamond v. Dod*, Cro. Car. 5; *Anonymous*, Loft, 460; *Chaundflower v. Priestley*, Yelv. 30. General covenants for quiet enjoyment are not broken by a tortious eviction, but by an eviction by title only. *Hayes v. Bickerstaff*, Vaughan, 118; *Hunt v. Allen*, Winch. 25; *Tisdale v. Essex*, Hob. 35. And, in an action for a breach of such a covenant, the plaintiff's declaration must set up an eviction by title paramount. *Walton v. Hele*, 2 Saund. 177; *Lanning v. Lovering*, Cro. Eliz. 916; *Nokes' Case*, 4 Coke, 80 b; *Bloxam v. Walker*, Freem. 124; *Foster v. Mapes*, Cro. Eliz. 212; *Brocking v. Cham*, Cro. Jac. 425; *Hamond v. Dod*, Cro. Car. 5; *Cowper v. Pollard*, W. Jo. 197.

But a disturbance of the lessee by the lessor himself is not regarded with the same lenity as an eviction by a stranger; it being clear that the lessor exposes himself to an action on his covenant, although he enters wrongfully, notwithstanding the covenant provides against lawful evictions only. *Corus v. —*, Cro. Eliz. 544; *Andrew's Case*, id. 214; *Penning v. Plat*, Cro. Jac. 388; *Pemberton v. Platt*, 1 Rol. 267; *Cave v. Brookesby*, W. Jo. 360; *Crosse v. Young*, 2 Show. 425; *Lloyd v. Tomkies*, 1 T. R. 671. And see *Seaman v. Browning*, 1 Leon. 157. For, in such a case, the court will not consider the word "lawful;" nor drive the plaintiff to his action of trespass, when by the general implied covenant in law the lessor has engaged not to avoid his own deed, either by a rightful or tortious entry. *Crosse v. Young*, *ante*; *Lloyd v. Tompkins*, *ante*. Indeed, it would hardly

the plaintiff, the mines under the land, as well as the surface, the cove-

be consistent with reason to allow the lessor to defeat the tenancy by pleading his own wrong.

So, if a lessor covenants for quiet enjoyment against himself and his executors, the lessee, on eviction by the executor, need not show that the executor entered by title, any more than in the case of the lessor himself. *Forte v. Vine*, 2 Rol. 21; *Ratcliff v. —*, 1 Bl. & Gold. 80.

To support an action against the lessor, it is not necessary that he should have a title to enter; it is sufficient if he enters under a claim of one. *Lloyd v. Tomkies*, 1 T. R. 671. And in the case just cited, where a vendor prevented a purchaser from enjoying a new appurtenance to the house sold, by locking it up against the purchaser's will, the court held that this was such an assertion of right as to render the lessor liable to an action. The covenant goes to the possession, and not to the title, and is not broken by a failure of the lessor's title merely. *Parker v. Dunn*, 2 Jones (N. C.) L. 203; *Waldron v. McCarty*, 3 Johns. (N. Y.) 471; *Howard v. Doolittle*, 3 Duer (N. Y. Superior Ct.), 464; *Whitbeck v. Cook*, 11 Johns. (N. Y.) 483; *Boothby v. Hathaway*, 20 Me. 251; *Webb v. Alexander*, 7 Wend. (N. Y.) 281; *Kortz v. Carpenter*, 5 Johns. (N. Y.) 120; *Van Slyck v. Kimball*, 8 id. 198; *Grist v. Hodges*, 3 Dev. (N. C.) L. 200; *Cable v. Wellborn*, 2 id. 388. And it has been held that a mere recovery in ejectment does not have that effect. *Kerr v. Shaw*, 13 Johns. (N. Y.) 236. Or in trespass as a person claiming title to the land. *Webb v. Alexander*, *ante*. But the better rule would seem to be that a recovery against the lessor in any action either at law or in equity involving his title or estate, and affecting his immediate right of possession, operates as a breach of the ordinary covenant for quiet enjoyment. *Martin v. Martin*, 1 Dev. (N. C.) L. 43; 2 Platt on Leases, 289, and cases cited. But in order to constitute a breach there must be a union of acts of disturbance and title, and a disturbance by a mere intruder does not create a breach. *Hoppes v. Cheek*, 21 Ark. 585; *Runtin v. Robertson*, 2 Strobb. (S. C.) 366. And the eviction and disturbance must be under rights or a title exist-

ing at the time when the lease was made, and not under rights subsequently acquired. *Ellis v. Welch*, 6 Mass. 246. The rule is, as expressed in *Knapp v. Marlboro*, 34 Vt. 235, that, to sustain an action for the breach of a covenant for quiet enjoyment, it is necessary for the plaintiff to prove that he was evicted by a person who had a lawful and paramount title, existing before or at the time when the covenant was entered into, as the covenant relates only to the acts of those claiming title and to rights existing at the time it was entered into. See also *Grist v. Hodges*, 3 Dev. (N. C.) L. 200. A mere demand of possession by a person having title does not operate as a breach of this covenant. *Cowan v. Silliman*, 4 id. 46. Nor does an eviction from a part of the premises under a statute, or municipal authority. *Frost v. Earnest*, 4 Whart. (Penn.) 86.

An accidental trespass on the premises in hunting, *Seddon v. Senate*, 13 East, 72, or an entry for the purpose of beating the lessee, would not have that effect. *Penn v. Glover*, Cro. Eliz. 421. If the lessor covenants for quiet enjoyment against the acts of a person particularly specified, a disturbance by that person will amount to a breach, whether it is a rightful or tortious disturbance. *Foster v. Mapes*, Cro. Eliz. 212; *Tisdale v. Essex*, Hob. 35; *Hill v. Browne*, Freem. 142; *Perry v. Edwards*, 1 Stra. 400; *Nash v. Palmer*, 5 M. & S. 374; *Fowle v. Welsh*, 1 B. & C. 29. But see *Hayes v. Bickerstaff*, Vaugh. 118. So, where one covenanted for quiet enjoyment without interruption by any person "having or claiming, or pretending to have or claim," any right of common, and a breach was assigned, alleging an interruption by one J. B., who claimed common, &c., it was held that the plaintiff need not show any title in J. B.; for the covenant expressly extended not only to those who had right, but to those who claimed or pretended to a right; and, therefore, whether the claim were rightful or groundless, the covenantor was liable. *Southgate v. Chaplin*, 10 Mod. 883; *Perry v. Edwards*, Stra. 400.

If a general covenant for quiet enjoyment contains an exception of particular persons,

nant of the defendant was that he had good title to the mines. That

the exception will be construed strictly, so as not to include any others than those expressly named. *Woodrosse v. Greenwood*, Cro. Eliz. 517. A covenant for the quiet enjoyment of certain premises demised, excepting from the demise to one E. K. a certain close, parcel thereof, does not amount to a covenant for quiet enjoyment against an interruption by E. K. as to the lands actually comprised in the lease. *Woodroff v. Greenwood*, Cro. Eliz. 517; *Rashleigh v. Williams*, 2 Vent. 61.

In assigning a breach of a covenant for quiet enjoyment, where the interruption is the act of a third party, against whom the covenant has not specifically provided, it is not sufficient to allege that having lawful right and title he entered, without alleging also that he had such lawful title before or at the time of the date of the lease to the plaintiff; for possibly he might have derived title from the plaintiff himself. *Kirby v. Hanksaker*, Cro. Jac. 315; *Wooten v. Hele*, 2 Saund. 177; *Proctor v. Newton*, 1 Vent. 184; *Norman v. Foster*, 1 Mod. 101; *Forte v. Vine*, 2 Rol. 21; *Skinner v. Kilbys*, 1 Show. 70; *Anon.*, 2 Vent. 46; *Rashleigh v. Williams*, 2 Vent. 61; *Buckley v. Williams*, 3 Lev. 325; *Jordan v. Twells*, Ca. temp. Hard. 171; *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. The East India Company*, 8 T. R. 278; *Campbell v. Lewis*, 3 B. & Ald. 392. And see *Noble v. King*, 1 H. Bl. 34; *Brookes v. Humphreys*, 5 Bing. N. C. 55; *Fraser v. Skey*, 2 Chit. 646. It is not necessary, however, for the declaration to show what title he had. A different rule would impose insuperable difficulties on the plaintiff, a knowledge of the title being only to be acquired by inspection of the deeds, to which he could not have access. *Proctor v. Newton*, *ante*; *Foster v. Pierson*, *ante*; *Hodgson v. The East India Company*, *ante*. But where the interruption is by the lessor himself, *Corus v. —*, Cro. Eliz. 544, or by a person against whose acts the covenant has specially provided, it is sufficient to allege an entry by him, without stating under what title or pretence, or whether by right or wrong, *Foster v. Mapes*, *ante*. Some particular act, however, by which the plain-

tiff is interrupted must be shown, otherwise the breach will not be well assigned. *Anon.*, Com. 228. In an action on a covenant that the lessor is seised in fee, a breach may be assigned in terms as general as the covenant, viz., that he was not seised in fee, without showing that another was so seised, nor why the defendant was not so seised. *Muscot v. Ballet*, Cro. Jac. 369; *Glinister v. Audley*, T. Raym. 14; *Glimston v. Audly*, 1 Keb. 58. So, on a covenant that the lessor has good right to demise, the lessee may assign as a breach that he had not good right, without showing in whom the right was vested. *Bradshaw's Case*, 9 Coke, 60 b; *Salman v. Bradshaw*, Cro. Jac. 304; *Lancashire v. Glover*, 2 Show. 460.

In an action on a covenant for quiet enjoyment, an allegation, as a breach, that the plaintiff (lessee) entered and was evicted by the defendant (lessor), is not supported by proof that he made a demand of possession and was refused, an expulsion, which is a putting out, not having taken place; for a party who comes to claim, but has never entered, cannot be expelled. The breach is not for expelling, but for not letting in. *Hawkes v. Orton*, 5 Ad. & El. 367; *Warn v. Bickford*, 9 Pri. 43. The ordinary covenant, by the lessor, for quiet enjoyment as against any person claiming by, from, or under him, is broken by an eviction of the tenant by the lessor's widow entitled under a conveyance taken by the lessor to the use of himself and his wife. *Butler v. Swinnerton*, Cro. Jac. 657. Also, by an eviction by a person claiming under a prior appointment by the covenantor and another person. *Calvert v. Sebright*, 15 Beav. 156. As to what constitutes an eviction, see chapter on EVICTION, *post*. But a distress for arrears of land-tax due from the lessor at the time of the demise will not operate as a breach. *Stanley v. Hayes*, 3 Q. B. 105. The lessee of a house and garden, forming part of a large area of building ground, is not entitled under this covenant to restrain the lessor or persons claiming under him from building on the adjoining land so as to obstruct the free access of light and air to the garden.

covenant, I think, was broken as soon as it was made, by reason of his having before become party to a lease of the mines, which lease was then in force.¹ It was a covenant running with the land, and a continuing

Potts v. Smith, L. R. 6 Eq. 311. When contained in a lease of the exclusive right of shooting and sporting over a farm, this covenant does not hinder the tenant of the farm from using the land in the ordinary way, or from destroying furze and underwood in the reasonable use of the land as a farm; and the lessor will not be liable for wrongful acts committed by such tenant contrary to the reservation of his landlord. *Jeffries v. Evans*, 19 C. B. N. s. 246. See *Newton v. Wilmot*, 8 M. & W. 711. Under a covenant in the form above mentioned contained in a lease of a stream of water excepting so much as should be sufficient for the supply of persons with whom the lessor should have already contracted, diversions occasioned by contracts made previously to the demise will not constitute breaches. *Blatchford v. Plymouth*, 3 Bing. N. C. 691. Where the covenant provides that the lessee shall quietly hold and enjoy the premises for and during the said term, the last words must be taken to refer to the term which the lessor assumed to grant by the lease, and not to the term which he had actually had power to grant. *Evans v. Vaughan*, 4 B. & C. 261, 268.

A general covenant for quiet enjoyment extends only to the acts of persons claiming under a lawful title. *Dudley v. Folliott*, 3 T. R. 584. For the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose. *Wotton v. Hele*, 2 Wms. Saund. 178, note (8). The construction, however, is different where an individual is named; for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore reasonably be expected to stipulate against any disturbance from him, whether by lawful title or otherwise. LORD ELLENBOROUGH, C. J., in *Nash v. Palmer*, 5 M. & S. 387; *Fowle v. Welsh*, 1 B. & C. 29.

Under a general covenant for quiet enjoyment contained in the lease of a coal mine, the working of iron-stone lying between the surface and the demised coal in such a manner as to interrupt the lessee in

his occupation of the mine, will constitute a breach. *Shaw v. Stenton*, 2 H. & N. 858.

Under a covenant by the lessor, in an underlease, that the lessee shall hold the premises without any lawful eviction, &c., by the lessor, or any persons whomsoever claiming by, from, under or in trust for her, or by or through her acts, means, right, &c., an eviction of the underlessee by the original lessor for a forfeiture incurred by the use of the premises as a shop, contrary to a covenant in the original lease, of which the underlessee had not been informed, is not an eviction by means of the lessor within the meaning of the covenant. *Spencer v. Marriott*, 1 B. & C. 457. See *Woodhouse v. Jenkins*, 9 Bing. 431. Under a covenant that the tenant, paying the rent and performing the covenants, shall quietly enjoy, the payment of rent is not a condition precedent to the performance of the covenant for quiet enjoyment. *Dawson v. Dyer*, 5 B. & Ad. 584. A clause in a deed, whereby the lessor "for himself, his heirs and assigns, the premises unto the lessee, his executors, administrators, and assigns, under the rents, covenants, &c., before expressed, against all persons whatsoever lawfully claiming the same, shall and will, during the term, warrant and defend," operates as an express covenant for quiet enjoyment during the whole term granted by the lease. *Williams v. Burrell*, 1 C. B. 402.

¹ Covenants of this character are broken by the existence of any incumbrance upon the land the instant the deed or lease is delivered. *Seitzinger v. Weaver*, 1 Rawle (Penn.), 377; *Knepper v. Kuntz*, 58 Penn. St. 480; *Bingham v. Wetherwax*, 1 N. Y. 509; *Stewart v. Drake*, 21 N. J. L. 139; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72; *McCarty v. Leggett*, 3 Hill (N. Y.), 134; *Mott v. Palmer*, 1 N. Y. 564; *Chapman v. Holmes*, 10 N. J. L. 20; *Garrison v. Sandford*, 22 id. 261. But if a covenant of seisin is qualified by subsequent covenants in the deeds, as if the grantor covenants generally that he is well seised, &c., and warrants the premises to the grantee, &c., "against

covenant, and a breach of it by means of the lease was a continuing breach;¹ and although the plaintiff might have sued upon it upon his becoming possessed, and might have recovered the damages he had sustained (if any) by reason of the breach, he was not bound to do so; and I am of opinion that he continued entitled to sue for any damage afterwards sustained whenever any such should have resulted from the breach; and, finally, that if the statute of limitations apply at all to covenants for title, the time of limitation does not necessarily begin to run from the making of the covenant, or of a lease which is a breach of the covenant, and that it is no bar as long as the lease continues, and any damage nominal or substantial is or may be sustained.² I do not understand it to be questioned that the conveyance passed the mines as well as the land to the plaintiff, nor that a covenant for title runs with the land, nor therefore that the plaintiff is entitled to the benefit of this covenant, nor that it was broken by the making of the lease. And I am of opinion that he is entitled to sue upon it now, upon the ground that the existence of the lease, until it expired in 1865, was an incumbrance upon the land, and rendered it of less value than if it had not existed; and, further, that it made the entry of the lessees lawful, and so enabled them to take the fire-clay from the mine; and, although they themselves and not the defendant are liable to the plaintiff for the value of the fire-clay taken, it is a damage to the plaintiff that he is put to his action against them, and may incur extra costs in such action which he could not have been exposed to but for the right of entry conferred upon them by the defendant.³ I am also of opinion that the entry into the mine,

all claims and demands except the lord of the soil," both covenants must be construed together, and the last qualifies the first, so that the title of the lord of the soil does not operate as a breach of the first covenant. *Cole v. Hawes*, 2 Johns. (N. Y.) Cas. 203.

¹ But it is generally held that a general covenant of title in a deed does not run with the lands, because, being broken by the delivery of the deed or lease in which it is contained, it is *instantly* converted into a chose in action, which is not assignable. *Blydenburgh v. Cotheal*, 1 Duer (N. Y. S. C.), 176; *Harsher v. Reid*, 45 N. Y. 415; *Mirick v. Bashford*, 38 Barb. (N. Y.) 181; *Carter v. Denman*, 23 N. J. L. 260; *Lot v. Thomas*, 2 id. 260. But such a covenant in a lease stands upon a different footing. In Maine by statute, and in Missouri, *Dickson v. Desiree*, 23 Mo. 151; Indiana, *Martin v. Baker*, 5 Blackf. (Ind.) 232; and in Ohio, *Devone v. Sunderland*, 17 Ohio, 52, such covenants are treated as

continuous, fully sustaining the doctrine of *Kingdom v. Nottle*, 1 M. & S. 355, and 4 id. 53.

² It would be an exceedingly harsh rule that would compel a tenant, who is in the quiet enjoyment of premises, under a lease for a long term, to bring an action within twenty years, or any other shorter term, for a breach of such a covenant, where his damages would be only nominal, and thus preclude himself from any remedy, if by an actual eviction, at a later period, he sustained heavy damages; and it is believed that the courts are generally inclined, latterly, to hold that this is a continuous covenant, and runs with the land. See *Martin v. Baker*, *ante*; *Devone v. Sunderland*, *ante*; *Dickson v. Desiree*, *ante*; *Bennett v. Waller*, 23 Ill. 97.

³ A covenant against incumbrances is continuous, but only nominal damage can be recovered for its breach until the covenantee has been actually damnified thereby. *Reading v. Gray*, 5 J. & S. (N. Y. S. C.)

and the taking the fragments of coal in 1848 by virtue of the lease, which was within the twenty years, was a breach of the covenant for quiet enjoyment.

“The case of *Kingdon v. Nottle*,¹ upon a covenant for title, and *King v. Jones*,² upon a covenant for further assurance, are authorities to show that these covenants are continuing covenants and the breaches of them continuing breaches, and that a right of action accrues *toties quoties* when and as often as damage actually arises from the breach of either covenant.³ *Kingdon v. Nottle* was the case of a mortgage in fee, and the mortgagor covenanted with the mortgagee and his heirs and assigns that he had good title to convey and was seized in fee. The mortgagee held during his life and brought no action; after his death his executrix sued upon the covenant for title and the further covenant for further assurance, assigning for breaches that defendant had no title, and that plaintiff requested him to levy a fine, which he refused. She failed on the ground that the covenant ran with the land, and had passed to the devisee of the covenantee. But in the following year the second case was decided in an action brought by the same person as devisee of the original covenantee suing as assignee of the covenant, and assigning for breach that the defendant had no title, and for damage that the lands were of less value than if there had been a good title, and that she had been prevented from selling them for so large a price as she would otherwise have obtained. There it was argued that the breach having been in the testator's lifetime it could not be assigned; that the covenant might pass with the land, but not so the breach for which the testator and he alone could sue. But it was held that there was a breach also in the time of the devisee which gave her a right of action upon which she was entitled to sue:⁴ LORD ELLENBOROUGH observing, ‘The covenant passes with the land to the devisee and has been broken in the lifetime of the devisee; for so long as the defendant has not a good title there is a continuing breach; and it is not like a covenant to do an act of solitary performance which not being done the covenant is

79; *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254; *De Forest v. Leete*, 16 id. 122; *Hall v. Dean*, 13 id. 105; *Funk v. Voneida*, 11 S. & R. (Penn.) 109; *Cathcart v. Bowman*, 5 Penn. St. 317.

¹ 1 M. & S. 355; 4 M. & S. 53. See also *Bonomi v. Backhouse*, 9 H. L. C. 503; E. B. & E. 654; L. J. Q. B. 378.

² 5 Taunt. 418; 4 M. & S. 188.

³ Where the grantor or lessor was in possession at the time the instrument was delivered, and the grantee or lessee enters in pursuance of the deed or lease, the covenant for title runs with the land and the grantor or lessor is answerable thereon to the assignee of the grantee or lessee.

Slater v. Rawson, 6 Met. (Mass.) 439. And the same rule is adopted as to a covenant against incumbrances where it existed at the time of the conveyance and continued at the time of the assignment, so as to continually enlarge the damages, and the assignee is entitled to sue for damages subsequent to the assignment. *Sprague v. Baker*, 17 Mass. 589. But where the grantor or lessor is not in possession the covenant is broken at once, and does not run with the land. *Bartholomew v. Candee*, 14 Pick. (Mass.) 167. A covenant for further assurance runs with the land. *Bennett v. Waller*, 23 Ill. 93.

⁴ *Sprague v. Baker*, *ante*.

broken once for all, but is in the nature of a covenant to do a thing *toties quoties* as the exigency of the case may require.' Here then the damage, that the plaintiff was unable to sell at as large a price as she would have obtained if the title had been good, was held to constitute a continuing substantive cause of action; and if the action had been brought at a long subsequent period, and the statute of limitations had been pleaded, the time could not have run from any earlier period than the accruing of that action.

“ And so in *King v. Jones*,¹ where the covenant was for further assurance, the covenantee in his lifetime called upon the covenantor to levy a fine and afterwards died, and the plaintiff, his heir, to whom the covenant had passed as assignee, entered upon the premises and was possessed, and was afterwards evicted and brought his action, it was objected that the breach was in the lifetime of the original covenantee, and that he alone was entitled to sue, and that if any action lay after his death it must be by his executors, as the damages belonged to his estate. But, after an elaborate argument and time taken to consider, it was held by the Court of Common Pleas that the action well lay, and that the refusal to levy a fine (the further assurance required) was a breach and a damage to him; that ‘the ancestor (the original covenantee) had required the defendant to perform his covenant, but gave him time and did not sue him instantaneously for his neglect, but waited for the event. It was wise in him so to do until the ultimate damage was sustained, for otherwise he could not have recovered the whole value; the ultimate damage then not having been sustained in the time of the ancestor, the action remained to the heir, who represents the ancestor as to the land, as the executor in respect of personalty.’ These decisions show that it is the resulting damage, and not merely the breach of covenant, which gives the right of action.

“ It is true when these cases were decided there was no statute of limitation expressly taking away the right to sue upon a covenant after a certain number of years from the breach. But the language of the statute is that no action shall be brought but within twenty years after the action has accrued; and we have only to consider the real nature of the covenant for title, and of the various kinds of breaches of it, which may be committed, to see that the statute of limitations is wholly inapplicable to such breaches, except where the right of action is upon an eviction of the whole property conveyed, so that there is no land with which the covenant may run and nothing left upon which the covenant can operate.²

¹ 5 Taunt. 418; 4 M. & S. 188. See also *Bennett v. Waller*, 23 Ill. 93.

² The covenant being continuous, each breach constitutes a separate cause of action, and, if within the statute, it should apply only to breaches occurring more than

the statutory period before action brought; but the great majority of the cases in this country hold that the covenant of seisin contained in the conveyance of real estate does not run with the land. They hold the covenant to be *in presenti*, and that it

“ In such a case the statute may apply, and from such an eviction the time may begin to run. But, in the cases cited as here, the breach being the grant and continued existence of a lease of a part of the property only, as of the mines and minerals under the land, how can the statute apply? The mine may never be worked at all, so that no damage may ever be sustained; and if an action be brought on the grant of the lease, only nominal damages may be recovered. But the lease may be for forty years; a quantity of minerals may be taken at the end of ten years, a number of houses on the surface subverted and destroyed in twenty years, and a mansion injured in thirty years.

“ If these be not separate and substantive causes of action, upon each of which the complainant has at least twenty years to sue, of what use is the covenant in such a case? But suppose another case: Covenant for title in a conveyance in fee of a landed estate. It turns out that the covenantor a year or two before has sold and conveyed the reversion of one-half of the property at his death to A. B., provided A. B. is then living. The covenantor lives for twenty years and then dies, and A. B. survives him and enters. Upon these facts, I apprehend it is not to be doubted that the covenant is broken as soon as it is made; for if the purchaser, the covenantee, were minded to sell the property, or he became bankrupt, and it was of necessity to be sold, it would sell for much less than if there were an indefeasible title in fee simple. But supposing no action to be brought until the death of the covenantor and the entry of A. B., can it be contended that the statute of limita-

is broken, if at all, when the deed is delivered, and that the claim for damages thereby becomes personal in its nature to the grantee, and is not transferred by a conveyance to a subsequent grantee. But in Iowa, where deeds have been reduced to forms of great simplicity, the English doctrine, as stated in the text, has been fully adopted. A contrary rule is productive of great hardship, and operates oppressively in all cases where the land has been conveyed by the grantor, either to the grantee or subsequent purchaser, and there is a fair field for legislative intervention if necessary to correct the evils resulting from the doctrine so generally adopted here. There can be no good reason why, if the purchaser is evicted, he should not receive the indemnity of the covenant; for he is not only the first but the only sufferer in every instance, except where he has not paid for the land, and for the grantee under the deed, who has sold and received his pay for the land, so that he sustains no loss to

be permitted to sue and recover damages under this covenant is exceedingly unjust. If there is a covenant of warranty in the first grantor's deed, then he is liable over to his grantee under this covenant; but if there is no such covenant, then we have the anomalous case of a party who has no interest being permitted to sue for and recover damages where he has sustained none. *Scholfield v. Iowa Homestead Co.*, 32 Iowa, 317. And in such a case the rule of damages being usually the consideration money and interest (*Vail v. Junction R. R. Co.*, 1 Cinc. (Ohio), 317), a party is permitted to profit at the expense of others by a rule of law that is both unwise and unjust. *Richards v. Bent*, 59 Ill. 38. In Indiana, Massachusetts, South Carolina, Ohio, and Missouri, the courts have given effect to the doctrine stated in the text. *Martin v. Baker*, 5 Blackf. (Ind.) 282; *Devone v. Sunderland*, 17 Ohio, 52; *Dickson v. Desirea*, 23 Mo. 152; 1 N. & Mc. (S. C.) 104.

tions would be a bar? If it be, and the covenantee was ignorant of the conveyance until the death of the covenantor, he loses half his land and has no remedy. And if he hears of it and sues within the twenty years, but in the covenantor's lifetime, how can the jury estimate the damages in the uncertainty whether the covenantor may not survive A. B., and so that the covenantee will never be disturbed in his title?

"I apprehend, therefore, that upon these grounds and upon all the authorities the lease in question was a continuing breach of covenant, and that the plaintiff was entitled to his action at any time within twenty years of any damage, whether nominal or substantial, being sustained by entry into the mine or otherwise, as long as the lease was in force, and consequently from the entry into the mine in 1848, and the taking of the fragments of coal; and further, that the action lies by reason of the mere existence of the lease which, as conferring a right to enter the mine and upon the surface, affected more or less the value of the property until it expired by effluxion of time in 1865. I think, therefore, that judgment should be entered for the plaintiff, with nominal damages."

Previously to this statute, as before stated, a specialty debt was presumed to have been paid at the end of twenty years. And it seems that even in England, if the statute, through some defect in pleading, cannot be taken advantage of, yet the fact of payment may still be presumed.¹

SEC. 174. Covenants of Warranty, against Incumbrances, &c.— Covenants running with the land are such as relate to and concern the land, and pass with it where there is a privity of estate. Of this class are covenants of warranty, which are in effect the same as those

¹ Best on Presumptions, 188. The rule relative to mortgages is, that, where the mortgagee has never entered under the mortgage, and there has been no payment of interest, nor demand thereof, nor any admission of the mortgage as a subsisting lien, within twenty years, the mortgage will be presumed to have been satisfied. *Dunham v. Minald*, 4 Paige (N. Y.) Ch. 441; *Blethen v. Dewnal*, 35 Me. 556; *Chick v. Rollins*, 44 Me. 104; *Boyd v. Harris*, 2 Md. Ch. 210; *Cheever v. Perley*, 11 Allen (Mass.), 584; *Vanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Evans v. Huffman*, 5 id. 354; *Collins v. Torry*, 7 Johns. (N. Y.) 278; *Jackson v. Hudson*, 3 id. 375; *Giles v. Baremore*, 5 Johns. (N. Y.) Ch. 545. See also *Jackson v. Pratt*, 10 Johns. (N. Y.) 381; *Jackson v. Delancey*, 11 id. 365; *Belmont v. O'Brien*, 12 N. Y. 394. And the same rule applies to all sealed instruments for the payment

of money. The purchaser of land, who had given a mortgage thereon for the purchase-money, contracted with a third person to sell him certain land, and, as part of the consideration thereof, such third person covenanted to discharge the above-mentioned mortgage. The mortgagee subsequently became the assignee of the contract, agreeing to perform it, and took possession under it of the land included therein, and continued in possession to the time of the present suit, during which time no payment, or demand thereof, had been made upon the mortgage, though more than twenty-three years had elapsed between the time when the last payment became due and the filing of this bill. Held, that the mortgage was satisfied in equity, and would be presumed satisfied at law; and it was ordered to be cancelled. *Kellogg v. Wood*, 7 Paige (N. Y.) Ch. 578.

for quiet enjoyment, and extend to the possession as well as the title, so that any disturbance of the free and uninterrupted use of the premises under a superior right, even without an actual expulsion therefrom, is in law an eviction and a breach of the covenant.¹ There can be no breach of this covenant until there is an actual eviction either from the whole or some part of the premises,² and the eviction must be stated in the declaration.³ Consequently neither the statute, the common law, nor statutory presumption attaches to actions upon this covenant until the grantee or lessee is evicted from some part of the premises. But covenants against incumbrances are said to be broken as soon as the deed is delivered, if the grantor or his predecessors in the title had previously mortgaged or incumbered the same,⁴ and, although the mortgage is not due, nominal damages are recoverable;⁵ but, according to the English doctrine and some American cases, the grantee may wait until the mortgage becomes due, and neither the statute nor the presumption from lapse of time will attach to the covenant for actual damages until that time.⁶ But little difficulty will be experienced in

¹ *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Withby v. Mumford*, 5 Cow. (N. Y.) 137; *Suydam v. Jones*, 10 Wend. (N. Y.) 180.

² *Cowdrey v. Coit*, 44 N. Y. 382; *Kent v. Welch*, 7 Johns. (N. Y.) 258; *Knepper v. Kurtz*, 58 Penn. St. 480; *Patton v. McFarlane*, 3 P. & W. (Penn.) 419; *Flowers v. Foreman*, 23 How. (U. S.) 132.

³ *Clark v. McAnulty*, 3 S. & R. (Penn.) 364; *Paul v. Witman*, 3 W. & S. (Penn.) 407; *West v. Stewart*, id. 189.

⁴ *Cathcart v. Bowman*, 5 Penn. St. 317.

⁵ *Funk v. Voneida*, 11 S. & R. (Penn.) 109.

⁶ This rule is fully adopted in an ably considered case in Illinois. *Richards v. Bent*, 29 Ill. 38, in which the court say: "The principle which allows an action in the name of the assignee of the covenant of seisin, applies with much greater force in the case of the assignment of the covenant against incumbrances, when drawn in the form usual in this country. Where the covenant of seisin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all actual damage and all the damages that can result from the breach have accrued; the measure of damages is the purchase-money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer might well be held to come within

the rule prohibiting the assignment of choses in action. But the covenant against incumbrances is one of indemnity; the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. Without this there is the barren right of recovery of only nominal damages; the right of action is one only in name. A subsequent grantee does not claim to sue, by means of the purchase of a chose in action. The subject of his purchase was a lot of ground; his claim is that the covenant was annexed to the real estate; that it ran with the land and passed to him, not by direct operation of assignment, but as an incident to the land. The right of suit for nominal damages, which the covenantee had against the covenantor, was no matter of consideration between the parties, at the time of the purchase, but they expected that, in case the grantee should sustain any actual damage by reason of a prior incumbrance, the covenant would then be to him a means of indemnity. The case, therefore, does not come within the reason of the rule prohibiting the assignment of choses in action. Being unembarrassed by decisions of our own, upon the point, we feel free to adopt the more reasonable and just of the two rules; which is, the one which sustains the right of the subsequent

determining when the statute begins to run upon or the presumption attaches to a covenant, because in all cases it begins to run from the time of a breach thereof; and it is only necessary to ascertain at what time an action could first have been maintained thereon, to determine the period from which the running of the statute began.

Enough has already been stated to show the distinction between continuous covenants and those which are exhausted by a single breach; and this distinction is important and should not be lost sight of.

SEC. 175. **Bonds.**—Upon bonds, the statute, in those States where this class of obligations is within it, does not begin to run until there is a breach of condition; and if there are several distinct conditions, it only begins to run upon each condition from the time each was broken;¹ and the same rule prevails as to sureties and principals therein.² Upon an indemnity bond the statute does not begin to run until the party to whom it was given has been damnified; and it is doubtful whether the mere fact that a judgment has been obtained against him is sufficient to put the statute in motion. The fact that he has become liable to pay, without payment in fact, is not believed to be sufficient.³ In an English case⁴ where the plaintiff's declaration was framed upon a bond not setting out a condition, and the defendant pleaded that the cause of action did not accrue within twenty years, and issue was joined thereon, and it appeared at the trial that the bond had been executed more than twenty years before the action was brought, but that it was a post-obit bond for the payment of a sum of money after the death of a person who was proved to have died within twenty years, it was held that the statute did not begin to run until the death of such person, and consequently that the action was seasonably brought. Where acts are, by the terms of a bond, to be done successively in a series of years, a new cause of action arises from each omission to do the act at the proper time; and, if the plaintiff can show any breach within the statutory period, he is entitled to recover for that.⁵ If a bond is given, conditioned for the faithful discharge of the duties of a certain office, the statute begins to run in favor of the surety thereon from the time of an actual breach. Thus, where an action was

grantee to bring an action in his own name, against the principal grantor, on the covenant against incumbrances." The justice and the reason of this doctrine are incontrovertible. But it must be remembered that in a great majority of the States a contrary doctrine is held, and the statute attaches to this covenant as soon as the deed is delivered. *Chapman v. Kimball*, 7 Neb. 399.

¹ *Salisbury v. Black*, 6 H. & J. (Md.) 293; *Thurston v. Blackeston*, 36 Md. 501.

² *Thurston v. Blackeston*, 36 Md. 501.

³ *Illies v. Fitzgerald*, 11 Tex. 417. In *Hall v. Creswell*, 12 G. & J. (Md.) 36, it was held that the right of action accrued from the time of payment, and consequently that the statute then began to run.

⁴ *Sanders v. Coward*, 15 M. & W. 56.

⁵ *Blair v. Ormond*, 20 L. J. Q. B. 452; *Amott v. Holden*, 22 id. 19. In *Keefer v. Zimmerman*, 22 Md. 274, it was held no defence to an action for the breach of a covenant that there has been a previous breach upon which the statute has run.

brought upon a bond given by a commissioner to sell real estate, an action accrues against the surety after the lapse of a reasonable time within which the commissioner neglects to pay over the money, and from that time the statute begins to run in the surety's favor.¹

If no time is fixed within which the condition of a bond is to be performed, but it is left contingent upon the happening of a certain event, the statute does not attach thereto until such event transpires. Thus, in a New York case,² the defendant gave the plaintiff's testator a bond for fifteen hundred dollars, which sum was to remain with the defendant until demanded by the plaintiff's testator, and if not then paid the obligation of the bond to be in full force. The plaintiff's testator died without ever having made demand for the money, and bequeathed the bond to his daughter, the defendant's wife, with directions that on the death of either herself or husband his executors should collect it. The wife died first, and in an action upon the bond by the testator's executors it was held that the defendant by accepting the money upon a contract where no interest was payable, and the principal only at the will of the obligee, had put it in the power of the obligee to postpone the day of payment at his pleasure, and that the bequest to the wife of the obligor had the effect to postpone the possibility of demand until the death of either herself or the obligor.

Where, however, no time for performance is specified, and performance is not dependent upon any contingency, a right of action begins to run within a reasonable time. Thus, where a bond was conditioned to pay an outstanding mortgage on land bought by the mortgagee, and no time within which payment should be made was fixed in the bond, it was held that a right of action accrued and the statute began to run at the end of a reasonable time after the mortgagee would be obliged to receive the money.³ But in such a case it would seem that the right of the mortgagor to pay and the right of the mortgagee to sue for the money arose at once, and there would seem to be no reason why the rights of either party should be subjected to any such uncertainty as the rule last stated entails upon them; and in a case where a mortgage was executed, and fixed no time for redemption, it was held that the right to redeem attached at once, and the statute began to run from the execution of the mortgage.⁴ In a South Carolina case,⁵ where a covenant fixed no time for payment but provided for a reference to arbitration in case of any disagreement as to the amount to be paid, it was held that the statute attached to the demand from the date of the covenant, and that the statute of limitations did not begin to run until after the demand made by the obligee's executors, after the devisee's death. But if a specific time for performance is named, then the statute attaches at that time. Thus where A. conveyed land to B., and at the

¹ *Owen v. State*, 25 Ind. 107.

² *Sweet v. Irish*, 36 Barb. (N. Y.) 467.

³ *Jennings v. Norton*, 31 Me. 512.

⁴ *Tucker v. White*, 2 D. & B. (N. C.)

Eq. 289.

⁵ *Wilson v. Wilson*, 1 McMull. (S. C.)

Eq. 320.

same time gave him an obligation that if at the end of a year the land should not be worth the money received therefor with the interest, he would make up the deficiency, "or otherwise pay that amount on receiving a reconveyance," and B. at the same time gave to A. a bond stipulating that he would, on repayment of such money at any time within the year, reconvey the premises to A. It was held that B.'s right of action against A. did not accrue nor the statute of limitations begin to run until the expiration of the year, but that from that time the statute began to run upon the obligation.¹ In a case in Maine,² a question arose in an action upon a jail-bond, whether, where there were two distinct breaches of the bond, the statute began to run upon the first breach, so as to bar an action upon the second; and the court held that it did, because the amount recoverable upon the first breach would have been the same as for both. But in an action upon a bond where the liability is continuous, and arises for each breach, as upon a bond given to a sheriff by his deputy, conditioned for the faithful performance of his duties as such, the statute only runs from the date of each breach, and a recovery may be had as to breaches not barred, although the statute has run as to others.³

In the case of bonds conditioned for the conveyance of real estate, or title bonds as they are called, the statute does not begin to run against a suit by the obligee for a specific performance until a demand for a deed and a refusal by the obligor, or some other decisive act of the obligor indicating an intention to claim the land or repudiate the sale;⁴ but the statute attaches from the date of the first demand, and a new right cannot be acquired by a new demand.

SEC. 176. Effect of Acknowledgment of Payment on Specialties.—In those States where no provision is made by statute relative to specialties, the effect of acknowledgment is well expressed by Mr. BANNING in his work on Limitations.⁵ He says: "According to the Vice-Chan-

¹ *Smith v. Fiske*, 31 Me. 512.

² *Brown v. Houdlette*, 11 Me. 399.

³ *Austin v. Moore*, 7 Met. (Mass.) 116.

⁴ *Yeary v. Cummins*, 28 Tex. 91.

⁵ Page 185. In *Blair v. Ormond*, 17 Q. B. 423, which was an action of debt by the administrator of B. on a bond made by W. to B., dated 5th December, 1812. The condition recited that B. had agreed to advance to W. the produce of the sale of certain stock in the funds, without any other advantage than B. would have been entitled to if the stock had remained in his name in the bank; that B. had sold the stock and paid the produce to W.; and that it had been agreed between them that the same or a like sum of the same stock

should be replaced and transferred to B.; and the condition was that, if W., before 5th June, then next, purchased the said amount of stock and transferred the same to B., and paid to B., in lieu of the dividends thereof, such sums as B. would have been entitled to receive for the dividends if the stock had continued in his name, at such times, and in such proportions, and in such manner, as the dividends would have been payable to B. if the stock had not been sold, then the bond to be void. Breach: (1) that W. did not, before the 5th June, or since, purchase the said amount of stock and transfer to B., or to plaintiff as administrator; (2) that the dividends of the stock, if it had remained standing in the name of B., would have

cellor,¹ the principle on which the courts acted previously to the statute we are now considering was this. There was then no statute

been payable half-yearly after the date of the bond, and that the first and only one of such dividends before the said 5th June would have been payable on 5th January, 1813; that on 11th September, 1824, B. died; that, if the stock had continued standing in B.'s name, or plaintiff's as administrator, a large sum, to wit, &c., would have been payable half-yearly as dividends, and that the money payable in lieu of such dividends, and becoming due after B.'s death (during a period which was specified), amounted to a large sum, to wit, &c.; and that, although the stock had not been transferred into the name of B. or of his administrator, yet W. had failed to pay the sums so due in lieu of dividends.

The defendant pleaded that the causes of action did not accrue within twenty years next before the commencement of the suit.

To this plea the plaintiff replied: as to the first breach, that, while the stock remained untransferred, and a certain sum, to wit, &c., was due in lieu of the dividends, to wit, on 10th September, 1824, W. made an acknowledgment to J. B. that the stock remained untransferred contrary to the condition, and was due thereon, by W. making to B. satisfaction on account of part of the said sum, to wit, £10; and that the action was brought within twenty years next after such acknowledgment; and as to the other causes of action, that they did accrue within twenty years, &c.

To this replication the defendant rejoined, as to the first part of the replication, a traverse of the bringing of the action within twenty years next after such supposed acknowledgment. Issue thereon. As to the second part of the replication, issue was joined.

It was proved that B. had, since the advance to W., agreed to board and lodge with W. at 10s. 6d. per week, that amount to be deducted from the interest of the money which W. had borrowed; and that a settlement should be made every six months. B. had boarded and lodged with

W. till B.'s death, in September, 1824; but no settlement had ever taken place, though frequently demanded by B. It was held that, supposing issue raised by the rejoinder cast upon plaintiff the burden of proving that such an acknowledgment as that mentioned in the replication was made within twenty years next before, &c., there was sufficient evidence to entitle plaintiff to a verdict upon both the first and the second issues. Also, that the bond was not within Stat. 3 & 4 Wm. IV. c. 42, § 5; that the replication, therefore, was no answer in law to that part of the plea which related to the first breach; and that plaintiff was therefore not entitled to any damages on that breach. But that that part of the condition which stipulated for the payment from time to time, of the sums payable in lieu of the dividends still remained in force as to so much of the sums as had accrued due, from time to time, within twenty years before action brought, the penalty of the bond not having been insisted upon in respect of sums accruing due earlier; and that plaintiff, therefore, was entitled to damages in respect of so much of the second breach.

LORD CAMPBELL, C. J., in giving the opinion of the court, said: "The first question to be considered in this case is, whether there was evidence to go to the jury to entitle the plaintiff to a verdict on the first issue on the second plea. We think that there was. The defendants merely rejoined, as to the part of the plaintiff's replication to the second plea that the said action was not brought within twenty years next after the said supposed acknowledgment of the said Thomas Wood in the said replication alleged to have been made. Supposing that this casts upon the plaintiff the burden of proving that such an acknowledgment as is stated in the replication was made within twenty years next before the commencement of the action on the 4th of September, 1844, we think that the evidence was

¹ KINDERSLEY, V. C., in *Moodie v. Bannister*, 4 Drew, 432.

which prevented a bond creditor coming and claiming his debt at any time; but the courts of law, and the courts of equity following them,

quite sufficient for that purpose, as it proved an agreement between Wood and Buckley that Buckley should be boarded and lodged by Wood for the weekly sum of half a guinea, and that this weekly sum should go and be accepted in part satisfaction of the sums due from Wood to Buckley in respect of the dividends on the stock, till it should be replaced; and, further, that this agreement was carried into effect and acted upon till the death of Buckley, on the 11th of September, 1824, down to which time he was boarded and lodged by Wood; the weekly payment, by the agreement, going and being received under the agreement in satisfaction of money then due and growing due from Wood to Buckley in respect of the dividends, the stock never having been replaced. Therefore, if this evidence is believed, immediately before the death of Buckley, Wood made acknowledgment to him that the stock remained untransferred, and was then due; and Wood then made to Buckley part satisfaction on account of the bond, by making Buckley satisfaction on account of part of the sum of money then due and payable in lieu of the dividends. There being such evidence, we draw from it the inference which I have stated; and the action having been commenced within twenty years, this issue must be entered for the plaintiff. The cases of *Hart v. Nash*, 2 C. M. & R. 337, and *Hooper v. Stephens*, 4 Ad. & El. 71, are in point to show that such a dealing is equivalent to a money payment. *Worthington v. Grimsditch*, 7 Q. B. 479; *Calander v. Howard*, 10 Com. B. 290; *Bevan v. Gething*, 3 Q. B. 740; and the note in 1 Smith's Leading Cases, 321, on *Whitcomb v. Whiting*, 2 Dougl. 652, were also referred to during the argument on this point. And see *Lucas v. Jones*, 5 Q. B. 949.

"The verdict upon the second issue raised on the second plea must likewise be entered for the plaintiff, as the dividends mentioned in the second breach became due within twenty years next before the commencement of the action. By the agreement between the plaintiff and the defend-

ants, stated in the special case, either party is at liberty to raise any objection on the face of the record. And the defendants objected that the first replication to the second plea is bad in point of law, because such an acknowledgment as is there stated would not take the case out of the statutes of limitations. To judge of this objection, we must look to see what the real contract was, as it appears from the bond and condition bearing date 5th December, 1812. The condition contains a recital, that Wood wished to borrow from Buckley, and to take up at interest the sum of £877 4s. 1d. five per cent stock, and had applied to Buckley to advance him the same, or the produce by sale thereof; which Buckley had agreed to do, being entitled only to as much as he would have received in case the stock had continued standing in his own name. It then recites that the stock had been sold out, and the produce thereof, amounting to £792 4s. 2d. had been paid to Wood; and that it had been agreed between them that the like sum of £877 4s. 1d. five per cents, should be replaced by Wood in the name of Buckley. The condition is then declared to be, that Wood should replace the stock on or before the fifth day of June, 1813, and pay to Buckley, in lieu of the dividends thereof, such sum or sums of money as Buckley would have been entitled to receive for the dividends of the £877 4s. 1d. in case the same had continued standing in his name, at such time and times, in such shares and proportions, and in such manner, as the same dividends would have been payable to him in case the same had not been sold in manner aforesaid. The bond is conditioned for replacing a precise amount of stock on a fixed day, viz. 5th June, 1813, not for the payment of any given sum of money on that day, nor even for the payment of such a sum of money as would purchase the given amount of stock, but for replacing the stock itself. Such being the nature of the instrument on which the action is brought, we are to consider whether it comes within sect. 5 of Stat. 3 & 4 Wm. IV. c. 42, by which it is provided that, if any

held the doctrine of presumption, that after a certain lapse of time payment must be presumed, and when an action was brought on a

acknowledgment shall have been made, either by writing, or by part payment or part satisfaction on account of any principal or interest being then due on any specialty, it shall be lawful to the persons entitled to the action to bring their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid. The defendants' counsel insisted that this cannot extend to a bond conditioned for the replacing of stock, arguing that this is an act to be done, and that the breach sounds in damages, depending upon the price of the stock when it ought to have been replaced or when the action is brought.

"We are of opinion that this view of the 5th section is correct. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee is not payment of interest; neither is any sum of money thereby acknowledged to be due. Indeed the replication itself does not so allege; but only that the said Thomas Wood made an acknowledgment that the said amount of stock remained untransferred, by making part satisfaction on account of the money so payable in lieu of dividends. This averment certainly does not bring the case within the words of the 5th section, nor (as we think) within the spirit of it. If any authority was wanting, we have the case of *Gillingham v. Waskett*, 13 Price, 434, in which it was held that a plea of set-off to such a bond was bad, because it was not a bond for the payment of money. The argument, that, as the bond in question is plainly within the 3d section, it must necessarily be within the 5th, is quite untenable; for it is obvious that a bond conditioned to perform the covenants of a lease in respect of repairs, or any other matter sounding purely in damages, would be within the 3d section; and yet it would be impossible by any ingenuity of construction to bring it within the 5th. As, therefore, the first breach relates to the day of default, viz. 5th June, 1813, which was more

than twenty years before the action, and the plea sets up that defence, to which the replication is no answer in law, we are of opinion that, though the verdict on the rejoinder taking issue on that replication must be found for the plaintiff, the plaintiff nevertheless is not entitled to any damages on that breach, on account of the insufficiency of the replication.

"The second breach stands on very different grounds. Though the remedy to recover damages for not replacing the stock is taken away by lapse of time, yet the condition so to replace it is not thereby wholly destroyed; and that part of the condition which requires the payment from time to time of such sums of money as would have been payable by way of dividends if the stock had remained in the name of Buckley still continues in force. This last stipulation is distinctly expressed in the words of the condition, that Buckley was to receive such sums of money as he would have been entitled to for dividends at such times and in such manner as the dividends would have been payable to him if the stock had not been sold out. The defendants' counsel contended that this extends only to the payment of the dividends down to the 5th June, 1813, when the stock was to be replaced. But down to that day there could only have been one dividend due; and the language employed seems to us clearly to extend to all accruing dividends till the stock should be replaced.

It was further contended that the statute of limitations must run from the 5th June, 1813, when there was a forfeiture of the bond for not replacing the stock. But, as is laid down by PARKE, B., in the recent case of *Sanders v. Coward*, 15 M. & W. 48, 56, 'although, on the first breach of the condition of a bond, the obligee may sue the obligor, and have judgment under Stat. 8 & 9 Wm. III. c. 11, as a security of a higher nature for future breaches, he is not bound to pursue that course. He may waive the right of action on the bond, in respect of the first breach, or any number of breaches, and be contented with the specialty security only for future breaches,

bond or other specialty, what the courts of law did with respect to a defence founded on a lapse of time was, that after twenty years the judge would direct the jury to presume payment.¹ Of course that presumption, like any other, was capable of being rebutted by evidence, and the court held that evidence of an acknowledgment would be sufficient to rebut the presumption.² In fact, it was impossible for a debtor against whom an action was brought to ask the court to pronounce that the debt had been paid, when he had himself acknowledged the existence of the debt. It appears, therefore, to be a correct statement that, in the case of a specialty debt, the court could receive in evidence any acknowledgment of the alleged debtor in any shape, even when that acknowledgment was made to a third person, and that it was not necessary that such acknowledgment should amount to a new cause of action.”³

and sue afterwards on a subsequent forfeiture, and assign that for a breach.’

“For these reasons we are of opinion that the plaintiff is entitled to judgment on the second breach.” *Tuckey v. Hawkins*, 4 C. B. 655; *Bealy v. Greenslade*, 2 C. & J. 61; *Hollis v. Palmer*, 2 New Ca. 713, and *Savile v. Jackson*, 13 Price, 715.

¹ In *Jackson v. Pierce*, 10 Johns. (N. Y.) 414, where a mortgage had lain dormant from April, 1774, to March, 1802, it was held that, after deducting the period of the American Revolution, the lapse of time was sufficient to afford the presumption of payment. The presumption becomes absolute after the lapse of the period fixed by statute for prescription in analogous cases. If there is no entry or payment of interest, and being a presumption of law, it is in itself conclusive, unless encountered by distinct proof. *Whitney v. French*, 25 Vt. 663. In *Ware v. Bennett*, 18 Tex. 794, a neglect to foreclose a mortgage for four years after it falls due was held not conclusive ground for assuming, in favor of purchasers of the mortgagor’s interest, that the mortgage had been paid. See also *Appleton v. Edson*, 8 Vt. 241.

² But this presumption is effectually repelled by a payment of interest within the statutory period before action brought, *Hughes v. Blackwell*, 6 Jones (N. C.) Eq. 73; and the admissions of a mortgagor that the mortgage debt is due are evidence to rebut the presumption of payment, especially where it does not appear that the true tenant had an interest before the admissions were made, *Frean v. Drinker*, 8 Penn. St. 520.

The presumption of payment, so far as mortgages are concerned, does not apply so long as the possession of the mortgaged premises is in the mortgagee. *Croaker v. Jewell*, 31 Me. 306.

³ In New Hampshire, in *Howard v. Hildreth*, 18 N. H. 105, it was held that when a mortgagor has retained possession of mortgaged premises for more than twenty years after the execution of the mortgage, but has acknowledged the debt and paid interest upon it within twenty years there is no presumption that the debt is discharged; and the same has also been held in South Carolina. *Wright v. Eaves*, 10 Rich. (S. C.) Eq. 582. But in *Gould v. White*, 26 N. H. 178, it was held that unexplained possession of the mortgaged premises for more than twenty years, may be left to the jury in connection with proof of partial payments and other evidence, as tending to show that the mortgage debt was fully paid. A presumption of payment is not like an actual payment which satisfies the debt as to all the debtors; it operates as a payment only in favor of the party entitled to the benefit of the presumption; and, in case of the lapse of over twenty years from the time when a bond secured by mortgage becomes due, the presumption of payment of the mortgage will not, as to the purchaser and those claiming under him, be repelled by proof of a payment made by the mortgagor after he had conveyed the premises to another person. *New York, &c. Ins. Co. v. Covert*, 29 Barb. (N. Y.) 435.

Where specialties are brought within the statute, and no provision is made for keeping them on foot by an acknowledgment, an acknowledgment can have no effect in suspending the operation of the statute, because the action thereon is not founded upon a promise, but upon an obligation of a higher nature, and in order to keep it on foot the recognition of its validity and continuance must be of as high a character as the instrument creating the obligation. Payments, however, as will be seen, *post*,¹ may have this effect.

¹ Chap. XVII., MORTGAGES.

CHAPTER XV.

TORTS QUASI E CONTRACTU.

SEC. 177. Time runs from Date of.

178. Consequential Injury.

179. Negligence.

180. Nuisances.

181. Action must be brought before
Prescriptive Right has been
acquired.SEC. 182. What requisite to establish
Prescriptive Right.

183. Trover.

184. Trespass, Assault, &c.

185. Criminal Conversation.

186. Seduction.

187. Failure to perform Duty im-
posed by Statute.

SEC. 177. **Time runs from Date of.**—In the case of torts arising *quasi e contractu*, the statute usually commences to run from the date of the tort, not from the occurrence of actual damage. And ignorance of the facts on the part of the plaintiff will make no exception to the rule, though he discovers his injury too late to have a remedy. This will be the case, too, even where the defendant has betrayed the plaintiff into permitting the time to elapse in fruitless inquiries and negotiations.

There may be cases where the injured party may bring trespass or trover, or may waive both, and bring assumpsit for the proceeds of the property when it has been converted into money, and in the last case the tortfeasor cannot allege his own wrong so as to bring time back to the day of the tort.² And where a party has his election between trover and assumpsit, the fact that one remedy is barred will not defeat the other if the statute has not run upon that.³ Thus, where the maker of a note which was outlawed asked the holder to see it, and upon its being shown, destroyed it, it was held that trover lay for the note, and that the measure of damages was the face of the note with interest, notwithstanding the fact that the statute might have been successfully interposed against an action upon the note itself.⁴

The ground upon which this ruling rests is, that it cannot be presumed that, in an action upon a note or other obligation, so unlawfully destroyed by the maker, he would, although entitled to do so, have set up the statute to defeat it. "The only question of law in the case,"

¹ East India Co. v. Paul, 7 Moo. P. C. C. 85. See as to directors of insolvent bank, Hinsdale v. Larned, 16 Mass. 68.

² Lamb v. Clark, 5 Pick. (Mass.) 193. But there must be an actual conversion. Jones v. Hoar, id. 285. See Lamine v.

Dorrell, 2 Ld. Raym. 1216; Hitchin v. Campbell, 2 W. Bl. 827; Hambly v. Trott, Cowp. 371.

³ Ivery v. Owens, 28 Ala. 641.

⁴ Outhouse v. Outhouse, 13 Hun (N. Y.), 130.

said TALCOTT, J., "arises upon the rule laid down by the judge as to the measure of damages. He charged the jury, in effect, that if they found a verdict for the plaintiff, she was entitled to recover the full face of the note, with interest; that, notwithstanding the note was outlawed, it constituted a moral obligation sufficient to form a good consideration for a new note or new promise; that if the defendant should choose to set up the statute of limitations in a suit on the note, the defence would prevail, but that the defendant, being a wrong-doer, was entitled to no presumptions in his favor. It is true that the general rule in an action for the conversion of a note of a third party is, that the damages are to be measured by the amount apparently due upon the note, but it may be shown that by reason of part payment, or the insolvency of the party obligated to pay the note, or by reason of the existence of some legal defence to the note, the plaintiff has not, in fact, sustained damages to the extent of the face of the note by reason of its conversion.¹ It is, however, held that where the maker of the note has converted it, in an action brought against him for such conversion he cannot set up his own insolvency by way of mitigating the damages. The statute of limitations is a good defence if specially pleaded. If not specially pleaded, it does not defeat an action on the obligation. The question is, whether it is to be presumed that the defendant would set up that defence to this obligation in behalf of his sister, as was conceded, for borrowed money and no part of which had been paid. Could such a presumption be indulged as being the course likely to be pursued by a man under such circumstances where the outlawry of the note was occasioned by the indulgence of his sister?"

"But could such a presumption be indulged in favor of this defendant? He was a wrong-doer, a wilful trespasser and spoliator, and is not only deprived of all presumptions in his favor, but all presumptions are against him according to the maxim, '*Omnia presumuntur contra spoliatorem.*' It was upon this ground that the judge at the circuit put his ruling on the question of the measure of damages, and we think it was a proper application of the rule."

SEC. 178. **Consequential Injury.** — Although, as has been seen, time commences usually to run in a defendant's favor from the time of his wrongdoing, and not from the time of the occurrence to the plaintiff of any consequential damage, yet in order to produce this result it is necessary that the wrongdoing should be such that nominal damages may be immediately recovered. Every breach of duty does not create an individual right of action. And a distinction something similar to that which has been drawn by moralists between duties of perfect and imperfect obligation may be observed in duties arising from the law. Thus a breach of public duty may not inflict any direct immediate wrong on an individual; but neither his right to a remedy, nor his liability to be

¹ Booth v. Powers, 56 N. Y. 22.

precluded by time from its prosecution, will commence till he has suffered some actual inconvenience.¹ But it is otherwise where there is a private relation between the parties, where the wrongdoing of one at once creates a right of action in the other; and it may be stated as an invariable rule that when the injury, however slight, is complete at the time of the act, the statutory period then commences, but, when the act is not legally injurious until certain consequences occur, the time commences to run from the consequential damage, whether the party injured is ignorant of the circumstance from which the injury results or not.²

¹ *Hurst v. Parker*, 1 B. & Ald. 92; *Tanner v. Smart*, 6 B. & C. 603.

² In *Bank of Hartford Co. v. Waterman*, 26 Conn. 324, this question was carefully considered and the cases reviewed. In that case an officer who had undertaken to attach real estate on mesne process made return that he had attached a certain piece of land belonging to the defendant, and had left with the town clerk, as in such cases he was required by the statute to do, a true and attested copy of the writ and of his return thereon. In fact he had left a copy of the writ and his return in the town clerk's office, describing another and different piece of land from that described in his return on the original writ. Both pieces of land, however, belonged to the defendant, and either would have been sufficient to satisfy the plaintiff's demand. The error was not discovered until the plaintiff had attained judgment and taken out execution, at which time more than two years had elapsed both from the date of the levy and that of the return. The debtor in the mean time had failed, and no property could be found on which to levy the execution. In an action to recover for the officer's default, the statute of limitation was pleaded, and it was held that the cause of action did not accrue either at the time of the service of the writ or at that of the false return, but from the time when the plaintiff had sustained actual damage by his failure to secure satisfaction of his execution. "Ignorance of his rights," says STORRS, J., "on the part of the person against whom the statute has begun to run will not suspend its operation. He may discover his rights too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident

to a law arbitrarily making legal remedies contingent on mere lapse of time. *Brown v. Howard*, 2 B. & B. 73; *Sims v. Britton*, 5 Exch. 802; *Short v. McCarthy*, 3 B. & Ald. 626; *Blair v. Bromley*, 5 Hare, 542; *Battley v. Faulkner*, 3 B. & Ald. 288. Strong, equitable considerations in favor of the present plaintiffs seem, however, to grow out of the fact that they were actually betrayed into ignorance of their rights by the wrongful acts of the defendant himself; that they were misled by the very record to which they might and should rightfully refer for knowledge of their rights, and of which the defendant himself was the author, having verified it under his official oath. It is palpably unjust for the defendant to set up the statute as a defence under such circumstances; to do so is, in one sense, taking advantage of his own wrong: yet it is difficult to see that he is not, by the clear provision of the statute itself, protected in so doing; nor are we aware of any well-established doctrine by which a party in a court of law can be prohibited, on the score of equitable estoppel, from defending himself under a public statute, designed to be of universal operation in the matter of legal remedies. LORD CAMPBELL properly suggested, relative to a controversy not unlike the present, that 'hard cases must not make bad law.' *East India Co. v. Paul*, 7 Moo. P. C. C. 85. At the same time, if the dictum of LORD MANSFIELD, in *Bree v. Holbech*, Doug. 655, that "there may be cases which fraud will take out of the statute of limitations," were confirmed by direct adjudication, we should be reluctant to withhold the application of the doctrine in the present instance. See *Blair v. Bromley*, *ante*.

"These views are, however, immaterial

In a case where the plaintiff had been damaged by the cutting away of

to either party; as the cause of action, in our judgment, accrued—that is to say became complete and perfect—within two years next previous to the commencement of the present suit. Whether the true basis of the injury eventually suffered by the plaintiffs was the neglect to serve the process, or the false return, it cannot be useful to determine, as neither of these facts singly, or both together, in our opinion, would be enough to constitute a cause of action. No right to sue became lodged in the plaintiffs until a certain consequence resulted from one or both of these breaches of duty by the officer. If this be so, that the damnifying consequences of the defendant's violation of duty are an essential ingredient in the plaintiff's cause of action, the statute of limitations cannot begin to run until this cause of action becomes complete. The consequences are not, in such a case, mere aggravating circumstances, enhancing a legal injury already suffered or inflicted; nor are they the mere development of such a previous injury, through which development the party is enabled for the first time to ascertain or appreciate the fact of the injury. But, inasmuch as no legal wrong existed before, they are an indispensable element of the injury itself, and must therefore themselves fix, or may fix, the period when the statute of limitations shall commence to run. Authorities can hardly strengthen a proposition so manifestly just. If we are wrong, some strictly legal injuries might never for a moment be capable of redress. For instance, so much time might accrue between the injurious act of bringing a vexatious suit and its final termination in favor of the defendant therein, that, if the original act were the entire *gravamen* of the latter's suit against the wrong-doer, he might be barred of his remedy before his right to redress ever vested in him for a single hour. But authorities are not wanting on this point. When the injury, however slight, is complete at the time of the act, the statute period commences, *Wordsworth v. Harley*, 1 B. & Ad. 391; but when the act is not legally injurious until certain consequences occur, the statute begins to run from the

consequential injury, *Roberts v. Read*, 16 East 215. In *Gillon v. Bodington*, 1 Car. & P. 541, it is agreed that the language of the English statute was even somewhat strained to make its construction comport with this very just principle, the limitation by that enactment taking date from the 'fact committed,' and the court extending the meaning of this term so as to make consequential damage one essential part of the fact referred to.

"It only remains, therefore, to determine whether a neglect to serve mesne process, or a false return of such process, is actionable in itself, or whether it becomes so only when a real injury follows from it. No distinction can be drawn between a neglect to serve and a false return in deciding the point presented. LORD DENMAN, in *Wylie v. Birch*, 4 Ad. & El. 566.

"The case of *Planck v. Anderson*, 5 T. R. 37, early settled the doctrine, that when an escape on mesne process took place, the only remedy of the plaintiffs was an action on the case for the consequential injury, and that, 'if no damage be sustained, the creditor has no cause of action.' (BULLER, J.)

"Of the contrary decision of *Barker v. Green*, 2 Bing. 817, we shall take occasion to speak hereafter. After the latter decision, in 1836, LORD ABINGER, at the exchequer chamber, in a colloquy with counsel, took strong ground against the idea that an officer was at all events liable in nominal damages for neglect to serve mesne process. *Brown v. Jarvis*, 1 M. & W. 708. Two years after, the same court unequivocally denied the right of a plaintiff to subject an officer for an escape on mesne process, unless he had sustained actual damage or delay of his suit thereby. *Williams v. Moyston*, 4 M. & W. 145. They expressly disapprove *Barker v. Green*, suggesting, perhaps incorrectly, that it is loosely reported. LORD DENMAN, while delivering the judgment of the Court of Queen's Bench in 1839, used this language: 'No damage is stated, unless some legal damage necessarily results from the neglect of the sheriff [to arrest on mesne process]. We do not think that any such damage does necessarily result.' That is

certain pillars of coal which supported the surface, and which was ulti-

to say, the act is not in itself legally injurious. The Supreme Court of New Hampshire early decided that a sheriff is not liable to an action for an escape on mesne process, if he have the body at the return of the writ. *Cady v. Huntington*, 1 N. H. 138. In *Clark v. Smith*, 9 Conn. 379, 10 id. 1, which was twice before the Supreme Court of this State, and in which the court decided that a creditor's recovery against a sheriff for an escape on mesne process must be restricted to his actual damage, the doctrine of JUSTICE BULLER, enunciated in *Planck v. Anderson* and quoted above, was cited by the court in full, without dissent. 9 id. 386. Upon the second trial of the cause, the jury found for the defendant, the court below having instructed them that the defendant was liable only for damages which the plaintiff had sustained by reason of the officer's neglect. This might have been construed as a direction to award no damages whatsoever unless some actual injury was shown. The jury at all events felt themselves at liberty to act under such a rule; and although the case was not brought before the Supreme Court on account of a verdict against evidence, yet that tribunal seem freely to have assumed that the judge's charge to the jury was susceptible of the construction just suggested, and thereupon indorse the verdict. JUDGE BISSELL says: 'The jury were directed to give damages commensurate with the loss sustained by the officer's neglect. For aught that appears, they have done so; and neither the principles of justice nor any rule of law demands of us that we should interfere with their verdict.' We must believe that the law is settled that actual damage is an essential element in a cause of action relating to a negligent service or false return of mesne process. Roscoe's *Nisi Prius*, 609; 2 Saund. Pl. & Ev. 878. Something may properly be said of decisions, which our examination of this case has brought to light, and which have an aspect adverse to the views adopted by us. Before discussing them, it is well to remark that a distinction is often drawn in the books between a cause of action growing out of

a nonfeasance or misfeasance relating to mesne process, and the same when they concern writs of execution. We believe the difference between the two cases to be practical rather than theoretical. We have no doubt that actual damage must be the basis of recovery in both, *Wylie v. Birch*, 4 Ad. & El. 566; but that it is presumed to be incident to one and not to the other. The burden of proof lies on the plaintiff in the latter instance to show some actual damage; in the former, on the defendant to show that there has been none. It has been held that if an officer, charged with a false return on final process, can prove that after the return the debtor became a legal bankrupt, so that the holding of the body could have been of no avail to the creditor, a complete defence is established; and that a plea in bar, setting up the bankruptcy only, is a complete answer to the action. *Wylie v. Birch*, *supra*. Now it is idle to say that proof of actual damage is not necessary in the case of an omission to execute final process, when the disproof of such damage is a perfect defence. If a trespass is made upon land, the act is legally injurious; nominal damages, at least, must be awarded. The trespasser cannot establish a complete defence by proving there was no real loss to the plaintiff. Still, courts have sometimes ruled that they will presume some actual damage to be necessarily incident to a breach of duty in reference to final process. The body being held by an execution for the payment of the debt, not for its security merely, they have regarded an escape, even for a short time, as suspending the debtor's inducement to perform his duty of immediately paying his obligation, as taking away from the creditor, for the time being, that which the law gives him as his satisfaction, and as invading his right to the constant, uninterrupted detention of the debtor's body. But no such inference, however regarded, arises in the case of a neglect to retain the custody of a debtor on mesne process. The debt may, notwithstanding, be perfectly secure, and enforced as promptly as if the security was constantly under the control of the officer.

mately injured in consequence, it was considered that time commenced

“To return: *Barker v. Green*, 2 Bing. 317, was an action for a failure to arrest on mesne process. The jury, finding no actual damage, rendered a verdict of one farthing. An attempt, with a view to costs only, was made to set aside the verdict. The court refused the motion, holding that ‘if there was a breach of duty, the law must presume some damage.’ In *Betts v. Norris*, 21 Me. 314, a decision of the Supreme Court of Maine, much noticed at the bar, the opinion of the majority of the bench seems to rest on the same idea: that a breach of official duty is necessarily a violation of the individual legal rights of the person in whose favor the duty is to be performed. We cannot assent to the sweeping doctrine of these cases. It would invite interminable and preposterous litigation.

“We apprehend, as has been suggested by the counsel for the plaintiffs, that a distinction is to be observed between breaches of public duty and breaches of duties to individuals; such, for instance, as those created by contract, whereby each party enters into and defines for himself an immediate obligation to the other. In the latter case, the breach of such an obligation is a direct and immediate wrong to the other, so that whether any evil consequences follow, or whatever consequences follow, the cause of action dates from the wrong, which will be treated as the cause of action, whether the plaintiff sues in tort or contract. For instance, if an attorney neglect his client’s business in such a manner as to break the implied contract between them, although a loss may not occur for years, a complete right of action accrued when the duty was violated; and the subsequent loss merely aggravates the injury. And whether he be sued in assumpsit or in case, the breach of duty will always be the injury for which he must respond. *Howell v. Young*, 5 B. & C. 259; *Short v. McCarthy*, *supra*; *Brown v. Howard*, 2 B. & B. 73; *Wilcox v. Plummer*, 4 Pet. (U. S.) 172. But where the duty is of a public nature, there is no direct relation between the public officer and the party in whose behalf the duty is to be performed. If it were so, then there should be the impli-

cation of a contract between them, and non-performance be actionable in assumpsit. Yet it is clearly settled that the latter form of action cannot be sustained in such a case. *Lovell v. Bellows*, 7 N. H. 375, 388. The duty violated is primarily a duty to the public; the violation is therefore unlawful; and when its consequences are the invasion of an individual right (and then only) it becomes a proper subject of redress by him. The duties imposed upon public officers are analogous to those of moral obligation. Their violation is not necessarily a legal injury to those in whose favor they exist. They must affect some right such as the law is wont to redress, before they can be made the subject of a suit. It is the duty of a municipal corporation to keep certain highways free from obstruction. The duty is to the public for the benefit of every individual in the community. If an obstruction is negligently permitted to exist, it may be said that, in a sense, a duty to each individual is violated. But it is not competent for every inhabitant of the vicinage thereupon to bring his action for the breach of duty to himself; not even if he is put to some trivial inconvenience by the obstruction. If he voluntarily or negligently throws himself in the way of being injured by it, he cannot recover. *Butterfield v. Forrester*, 11 East, 60. The mere violation of the public duty, although the duty is to him indirectly, involves no correlative legal right on his part to sue for such violation.

“It is said familiarly that rights and duties are reciprocal. This is, in a moral sense and in a properly understood legal sense, true. But it is evident from the illustration just employed that there is no such legal reciprocity between the general duties of public officers and the rights of parties in whose behalf the duties are to be performed, that the right is always actionable when the duty is violated. In the case of the highway, a person must be injured in reference to some other right than that which is correlative to the mere duty of keeping the highway clear for his benefit, — in his right to his health, or limbs, or property — before he can seek

to run against the plaintiff on the occurrence of the damage, and not

legal redress. Then he will have suffered a consequential not an immediate injury, and can resort to his action on the case. An officer neglects to serve a subpoena. It would be said to be his duty to serve all subpoenas. A plaintiff who gave it to him goes to trial; the witness voluntarily appears, and a full recovery is obtained. Could a suit be sustained by the plaintiff for the nonfeasance of the officer? Is the plaintiff's right legally coextensive with the officer's duty? Or must some other right of the plaintiff be affected by the neglect, to enable him to sustain an action? A writ of attachment is served without the plaintiff's consent, as a summons. The defendant is perfectly responsible, and the plaintiff, without delay or embarrassment, obtains complete pecuniary satisfaction. Can he resort to the officer for the breach of his duty in not complying with the mandate of the writ? An assessor's duty is to make a correct assessment in the case of every taxpayer. This is the obligation he owes to the public. His conduct is unlawful if he neglects it. If a taxpayer is assessed too little, the public duty is violated; can the taxpayer sustain a suit therefor? Or, even if his property is assessed too much, must he not wait until some other right than that which corresponds to the official duty (such as his right to his property, which may not be taken for an illegal tax) is violated before he can sue? To hold that every nonfeasance and misfeasance of an officer is actionable *per se* in favor of the party who is the special subject of the duty neglected or violated, would be a source of infinite confusion. We concur in the proposition of Mr. JUSTICE SHEPLEY, whose dissenting opinion in *Betts v. Norris*, *ante*, seems to us to contain reasoning more cogent and conclusions more just than those of the majority of the court, that 'a mere violation or neglect of duty enjoined by law, or otherwise imposed without contract, unless accompanied or followed by an injury to some person, cannot be the foundation of an action at common law.' Again, it would seem that for the justification of our general position in the present case, a strict reciprocity between

public duties and individual rights might be safely conceded. The term 'duty' may be used in a sense too strict to stand the test of legal criticism. We say familiarly, that it is an officer's duty to serve process, — to obey the mandate of a writ. Now it is his function to do so, but is it necessarily his duty, in an absolute sense? If not, then there is no absolute right on the part of a suitor to the performance of the function. If the right and duty were absolute, that a writ must be served, — served according to its literal mandate, and indorsed with a true return, — then an officer could not defeat an action for an escape on mesne process, by showing that the plaintiff had no lawful claim against the debtor. Yet, that he can is an elementary principle. *Alexander v. Macauley*, 4 T. R. 611. Now the real right which the law confers upon a suitor, and the real duty it imposes on an officer, is that the claim shall be enforced, the debt collected, through the law's process. The creditor has no absolute right to require that the exact amount of property set forth in his writ shall be attached. If the officer attaches but a tenth of that sum and this is sufficient to cover the plaintiff's debt, he has performed his duty and infringed upon none of the suitor's rights. The same course of reasoning would show that the plaintiff has no absolute right to a correct return. For instance, if its falsity should never become known to the adverse party, and an execution should be levied upon the property originally taken and should legally condemn it for the plaintiff's benefit, no action would lie. It is but another step in a perfectly natural chain of reasoning to say that the suitor has no absolute right to require that any of the defendant's property shall be attached; although it is the officer's legitimate function to obey the writ. His right is that the property of the defendant, or a certain portion of it, which was in reach at the time the attachment should have been served, or its equivalent, shall be forthcoming at the time of the issue of the execution, in case the execution debt is not paid on the officer's demand. So far as the attachment is concerned, therefore, the creditor is only enti-

from the date of the removal of the pillars.¹ So where the trustees of a turnpike company negligently made and continued in their road improper catchpits for water, so that on some occasions the water flowed over and injured the plaintiff's land, it was held that the continuance of the catchpits afforded a new cause of action every time such damage was caused, and that the statute only ran on each cause of action from the time it arose.²

In an action for maliciously opposing the discharge of an insolvent debtor, time was considered to run from the date of the opposition, and not from the cessation of imprisonment.³ But in an action for false imprisonment the statute does not begin to run until the imprisonment ends.⁴ But in an action for malicious prosecution or arrest, the stat-

tled to require that the officer shall proceed at his peril if he omits to attach. A suitor's right is not, then, a right to literal forms of procedure, but to enforce his judgment and collect his debt by law. Until this right is injured, no right is injured. Until the officer fails to bring the property of the debtor within the power of the law's final process, founded upon a creditor's valid judgment, he has been guilty of no violation of duty in a legal view. So that, if we suppose a direct relation between the plaintiff and the officer—a legal reciprocity of right and duty between them, and concede that damages are to be presumed where the former is invaded or the latter violated, it is clear that neither of these incidents occurs until something more than a neglect to attach or an incorrect return is imputable to the officer. The doctrine to which our course of reasoning has brought us is not novel as a general proposition. LORD TENTERDEN, in *Lewis v. Morland*, 2 B. & Ald. 64, previous to the decision of *Barker v. Green*, *ante*, used this language: 'Supposing the sheriff to be guilty of a breach of duty in letting the party out of custody, it does not thence follow that any action can be maintained against him for such breach of duty.' The opinion of LORD DENMAN, in the case of *Randell v. Whipp*, 10 Ad. & El. 719, contains this passage: 'We agree with the case of *Brown v. Jarvis*, that it is the duty of the sheriff to arrest the party on the first opportunity that he can; but we also agree with the court in that case, that some actual damage must be shown in order to make the

negligence of the sheriff in that respect a cause of action.' In a later case, the same judge says: 'When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount.' *Clifton v. Hooper*, 6 Ad. & El. 468." The court held that the statute of limitations took date from the time of the consequential injury, and not from the misfeasance or nonfeasance of the officer, and gave judgment for the plaintiff. See also *Roberts v. Read*, 16 East, 215, and *Gillon v. Boddington*, 1 C. & P. 541; and see *Whitehouse v. Fellowes*, 10 C. B. N. s. 765; and *Denys v. Shuckburgh*, 4 Y. & C. 42.

¹ *Bonomi v. Backhouse*, 5 Jur. N. s. 1345, 9 H. L. 503. This case was decided on appeal by LORDS WESTBURY, BROUGHAM, CRANWORTH, WENSLEYDALE, and CHELMSFORD, with the assistance of six of the judges.

² *Whitehouse v. Fellowes*, 10 C. B. N. s. 765.

³ See *Nicklin v. Williams*, 10 Ex. 259; *Violett v. Sympton*, 8 El. & Bl. 344.

⁴ *Dusenbury v. Keiley*, 8 Daly (N. Y. C. P.), 159. In *Eggington v. Mayor of Lichfield*, 32 Eng. L. & Eq. 237, the plaintiff was imprisoned upon an illegal warrant, and upon an application to court an order was made for his discharge. Previously to the making of the order another warrant had been given to the jailer by the parties who obtained the first warrant, and the jailer detained the plaintiff upon this warrant after the granting of the order. The last warrant was subsequently adjudged il-

ute begins to run as soon as the process is served or the arrest is made.¹

In the case first cited in the preceding note,² PARKE, B., referring to the above cases as to consequential damage, said, "It remains to consider some cases cited and much relied on, showing that the limitation of actions under particular statutes directed to be brought within a certain time 'from the fact committed,' dated from the period when consequential damage was occasioned, and therefore it was said that the damage was the cause of action. These statutes mean no doubt the limitation to run from the act, that is the cause of action. But on examining these cases they do not appear to be for injuries to rights, which this is, but solely for consequential damages, where the original act itself was no wrong and only became so by reason of those damages."

An important distinction exists between actions arising from torts and upon assumpsit, in that the right to the former cannot be revived by acknowledgment.³

SEC. 179. **Negligence.**—In actions for injuries resulting from the negligence or unskilfulness of another, the statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained.⁴

legal. Held, that the imprisonment under the first warrant was terminated by the order, and that the statute of limitations began to run from that period.

¹ Pratt v. Page, 18 Wis. 337.

² Nicklin v. Williams, *ante*.

³ Galligher v. Hollingsworth, 3 H. & M. (Md.) 122; Goodwyn v. Goodwyn, 16 Ga. 114.

⁴ Crawford v. Goulden, 33 Ga. 173; Wilcox v. Plummer, 4 Pet. (U. S.) 172; The Governor v. Gordon, 15 Ala. 72; Bank of Utica v. Childs, 6 Cow. (N. Y.) 238; Niagara Bank v. Plumb, 9 Wend. (N. Y.) 287; Murdis v. Shackelford, 4 Ala. 495; Brown v. Howard, 2 B. & B. 73; Thurston v. Blackinton, 36 Ind. 501. In Bank of Utica v. Childs, 6 Cow. (N. Y.) 238, a notary neglected to charge a prior indorser by giving the requisite notice of non-payment, &c., and the bank was compelled to pay damages. The action in favor of the bank not having been commenced until more than six years after the negligent act was done, was held barred by the statute, because its right of action against the notary accrued immediately on the omission, and was not dependent upon the payment of damages by it. In the case of

Wilcox v. Plummer, *ante*, a note was placed in the hands of an attorney for collection, and he neglected to join an indorser in the action. Subsequently he sued the indorser, but, because of a mistake in the process, it finally failed, and the statute having then run as against the indorser, and by reason thereof his liability upon the note ceased, the question was, whether the cause of action arose against the attorney when the mistake was made, or from the time when the damage was finally developed. The court held that it arose and became complete when the mistake was made, and as, dating from that period, the statute had run in his favor, he had judgment in his favor in the action.

In Dickinson v. Mayor, &c., 92 N. Y. 584, the plaintiff's complaint alleged that the defendant "improperly, carelessly, negligently, and unlawfully suffered ice and snow to be and remain upon the crosswalks," at the intersection of two streets in the city of New York; that in consequence thereof, plaintiff, while passing over said crosswalk, was thrown to the ground and injured, and plaintiff asked to recover the damages sustained. Held, that the

The gist of the action is the negligence or breach of duty, and not the consequent injury resulting therefrom.¹ But where a person or corporation is primarily liable for the negligence or misfeasance or malfeasance of another, the statute does not begin to run upon the remedy of such person or corporation against the person guilty of such negligence or breach of duty until the liability of such person or corporation has been finally fixed and ascertained;² because, in the latter case, the gist of the action is the damage, while in the former it is the negligence or breach of duty. In actions for negligence, the jury are not restricted to damages accrued up to the time of action brought, but may include all which have accrued up to the time when the verdict is rendered, as well as such as are likely to result in the future.³ There seems generally to be no distinction as to the time when the statute applies between actions

action was "to recover damages for a personal injury resulting from negligence" within the meaning of the provision of the code, limiting the time for the commencement of such action to three years.

Irvine v. Wood, 51 N. Y. 228; *Clifford v. Dam*, 81 id. 56; *Sexton v. Zett*, 44 id. 431; *Creed v. Hartmann*, 29 id. 591; *Congreve v. Smith*, 18 id. 82, distinguished.

The code providing that where "a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make a demand is complete," is applicable to actions against the city of New York.

Such an action is not saved from the operation of said provision by the provision declaring that any special provision of the statute remaining unrepealed, . . . which is applicable exclusively to an action against said city, shall not be affected by the code.

The provision of the charter of said city of 1873, providing that no action shall be maintained against the city "unless the claim upon which the action is brought has been presented to the comptroller, and he has neglected for thirty days after such presentment to pay the same," was intended for the benefit of the city, not of claimants, and does not deprive the city of the benefit of the said provision, as to the time, when the statute of limitations begins to run.

It was held that, as it was set forth in the complaint that the accident happened

in January, 1877, and that the claim was presented to the comptroller in April, 1881, the action was barred.

Fisher v. Mayor, &c., 67 N. Y. 76, distinguished.

In *Watson v. Forty-Second Street F. R. Co.*, 93 N. Y. 522, the plaintiff was injured by reason of the defendant's negligence in April, 1877. She commenced this action to recover damages in January, 1880. Held, that the statute of limitations was not a bar, as the case was governed by the three years' limitation prescribed by the code, not by the one year's rule previously existing; that the case was not within the exception in the provision of the code, making the rule of limitations therein prescribed the only one thereafter applicable to civil actions, except where a person was entitled, when the code took effect, to commence an action, and did so within two years thereafter.

Acker v. Acker, 81 N. Y. 143, distinguished.

¹ *Thurston v. Blackinton*, *ante*; *Gustin v. Jefferson*, 15 Iowa, 158; *Northrup v. Hill*, 61 Barb. (N. Y.) 136; *Lathrop v. Snellbaker*, 6 Ohio, n. s. 276; *Argall v. Kelso*, 1 Sanf. (N. Y.) 98; *Ellis v. Kelso*, 18 B. Mon. (Ky.) 296; *Sinclair v. Bank*, 2 Strobb. (S. C.) 344; *Cook v. Rives*, 13 S. & M. (Miss.) 328; *Battley v. Faulkner*, 3 B. & Ald. 288; *Howell v. Young*, 5 B. & C. 259.

² *Veazie v. Penobscot R. R. Co.*, 49 Me. 126.

³ *Wilcox v. Plummer*, *ante*.

for misfeasance or malfeasance and any ordinary action on the case.¹ But in actions of this class a question may arise as to the exact time when the default arose, and, as a right of action does not exist until default, this question is material. Questions of this character most frequently arise in actions against public officers, and the rules relating thereto, so far as any have been settled, have already been given *ante*, in the section relative to sheriffs. Where a statute provides that, unless a claim for damages done by reason of the negligence or wrongful act of a person or corporation, is made within a certain time, as, within thirty days, three months, &c., if a claim is made within that time, the action is not barred, if brought before the statute of limitations has run upon the class of actions to which it belongs.²

SEC. 180. **Nuisances.**—The rule in reference to acts amounting to a nuisance is, that every continuance is a new nuisance for which a fresh action will lie, so that, although an action for the damage from the original nuisance may be barred, damages are recoverable for the six years preceding the bringing of the action, provided such a period of time has not elapsed that the person maintaining it has acquired a presumptive right to do so.³ Thus, in the case first cited in the last note,

¹ *Baker v. Atlas Bank*, 9 Met. (Mass.) 182; *Hinsdale v. Larned*, 16 Mass. 68; *Mather v. Green*, 17 Mass. 66; *Fisher v. Pond*, 1 Hill (N. Y.), 672.

² *Railroad Co. v. Bayliss*, 74 Ala. 150. Of course, such actions belong to the class called at the common law, "actions on the case," *Newton v. N. Y. & N. E. R. R. Co.*, 56 Conn. 21.

³ *Staples v. Spring*, 10 Mass. 72; *Holmes v. Wilson*, 10 Ad. & El. 503; *Bowyer v. Cook*, 5 De G. & S. 236; *McConnell v. Kibbe*, 29 Ill. 483.

Silsby Manuf. Co. v. State of New York, 104 N. Y. 562.

The act of 1813, incorporating the S. L. N. Co., gave to the corporation the right to use only so much of the waters of Seneca River, as are needed for the purpose of navigation on its canal, and forbade its use by it for any other purpose. The State having acquired, under the act of 1825, "the stock, property, and privileges belonging and appertaining to" said company, and only that, has no authority to use any more of the waters of said river than are necessary for the purposes of navigation, and has the right to use them only for that purpose.

Upon trial before the Board of Claims, of a claim for an unlawful diversion by the State of the waters of said river, it

appeared that on account of defects in the locks, gates, walls, &c., of said canal, more water was diverted from the river than the superintendent of public works, in the exercise of his discretion, required for the use of the canal, and more than was necessary for navigation, and that if said structures had been in condition not to leak, the claimant, a riparian proprietor and mill-owner on the river, would have had the use of a portion of the surplus water so diverted. Held, that the claimant made out a case which would have created a legal liability as against an individual; and so, that under the act of 1870, he was entitled to his damages; and, that the State was not the sole judge of the necessity and of the amount to be taken, but it was incumbent upon it to prevent leakage or other wastage to a more than fair and reasonable extent; and that a finding of negligence on the part of any officer of the State was not necessary.

The diversion for which the claim was made was for the years 1882, 1883, and 1884. The claim was filed in August, 1884. Held, that the statute of limitations was not a bar to the claims for 1883 and 1884, that each day the unlawful use was continued a new cause of action arose; and, that as no recovery could be had for future damages, a failure to file a claim

in an action brought to recover damages for injuries sustained by reason of the erection of a dam, which set back the water of a stream and overflowed the plaintiff's land, it was held that while the plaintiff was barred from recovering damages arising from the erection of the dam, he might recover for its continuance. The same rule was adopted in an English case,¹ where the defendants as trustees of a turnpike-road, who had erected buttresses to support it, on the plaintiff's land, were held liable for its continuance there, although they had already been sued, and responded in damages for its erection.² But while this is the rule as to nuisances of a transient rather than of a permanent character, yet, when the original nuisance is of a permanent character so that the damage inflicted thereby is of a permanent character, and goes to the entire destruction of the estate affected thereby, or will be likely to continue for an indefinite period, and during its existence deprive the landowner of any beneficial use of that portion of his estate, a recovery not only may but must be had for the entire damage in one action, as the damage is deemed to be original;³ and as the entire damage accrues from the time the nuisance is created, and only one recovery can be had, the statute of limitations begins to run from the time of its erection against the owner of the estate or estates affected thereby.⁴ Thus, in the case last cited, the plaintiff was the owner of certain lots in Council Bluffs. In 1859, the lots were crossed by a meandering stream called Indian Creek. In order to remove the stream from one of the streets of the city, the city determined to and did cut a ditch along the side of the street and across the end of the plaintiff's lots. The stream was turned into the ditch. This was done in 1859 and 1860. The ditch was extended to a county ditch, but was not cut as deep as the county ditch, into three feet; in consequence of which, owing to the nature of the soil, a cavity was created at the point where the city ditch fell into the county ditch, which cut back up the stream. It reached the plaintiff's lots in 1866, when he began to sustain damages from the action of the water. Prior to the commencement of the action against the city for damages, the ditch had become fifty feet wide and twelve feet deep; and to arrest the action of the water and confine it within its

within the time limited by statute, after the commencement of the unlawful diversion, had no effect on the rights of the claimant to recover damages sustained within the two years limited.

¹ *Holmes v. Wilson*, 10 Ad. & El. 503.

² *McConnell v. Kibbe*, 29 Ill. 483. In *Bowyer v. Clark*, 4 De G. & S. 236, the defendant placed stumps and stakes in a ditch on the plaintiff's land, and the plaintiff, having recovered against him for placing the stumps and stakes there, brought

a second action for continuing them there, and it was held that he could recover, as the continuance of the original nuisance amounted to a new nuisance each day it was continued.

³ *Troy v. Cheshire R. R. Co.*, 23 N. H. 101; *Anonymous*, 4 Dall. (U. S.) 147; *Powers v. Council Bluffs*, 45 Iowa, 652. See also *Kansas R. R. Co. v. Muhlman*, 17 Kan. 224.

⁴ *Powers v. Council Bluffs*, *ante*; *Wood on Nuisances*, 889.

proper channel the plaintiff built a wall, which accomplished the desired result.

The statute of limitations being pleaded, the court below directed the jury to find a verdict for the defendant, which was sustained upon appeal.¹ Without desiring or in any measure intending to question the

¹ ADAMS, J., in delivering the opinion of the court, said: "No suit could have been maintained until some actual injury was caused to the plaintiff by the action of the water, resulting from the improper construction of the ditch. But in 1866, if not earlier, the plaintiff's premises began to be injured, and he then of course had a right of action. The only question in this case is as to the character of the damage. Was it, as it occurred from day to day, new damage? If so, the plaintiff was entitled under the evidence to recover some damage. Although his right of action as to a part of the damages which he had sustained might be barred, we have to distinguish them as between what must be regarded as original damages and what may be regarded as new damages. In 3 Bl. Com. 220, it is said that every continuance of a nuisance is held to be a fresh one, and that, therefore, a fresh action will lie. In *Staple v. Spring*, 10 Mass. 72, action was brought to recover for damages which, it was alleged, the plaintiff had sustained by reason of his land being overflowed by defendants' mill-dam. It was held that, while plaintiff was barred from recovering for damage caused by the erection of the dam, he might recover for damage caused by its continuance. In *McConnell v. Kibbe*, 29 Ill. 483, the same doctrine is recognized. The defendant owned the lower story of a building, the plaintiff the upper stories. The defendant removed in his story a partition brick wall, whereby the plaintiff's part of the building was injured. WALKER, J., said: 'The continuance of that which was originally a nuisance is regarded as a new nuisance.' As, however, the suit was brought for the creation of the nuisance and not its continuance, it was held that plaintiff could not recover, the cause of action for the creation of the nuisance having become barred. In *Bowyer v. Book*, 4 M. G. & S. 236, the plaintiff, having previously recovered against the de-

fendant for placing stumps and stakes on his land in a ditch, brought suit for continuing them in the ditch. It was held that he could recover. In *Holmes v. Wilson*, 10 Ad. & El. 503, the defendants, as trustees of a turnpike road, had built buttresses to support it on the plaintiff's land. Although the plaintiff had already recovered for the creation of the nuisance, it was held that he might recover for its continuance. The dividing line between the cases above cited and those in which the damages are considered as having all accrued at once as a part of the original injury is not always clearly distinguishable. In the *Town of Troy v. Cheshire R. R. Co.*, 1 N. H. 23, 83, the defendant had built its road partly over the highway. While it was held that plaintiff could recover only for the damages which had been sustained at the time of the commencement of the suit, yet it was considered that all the damages which plaintiff had sustained, or could sustain, accrued when the defendant's road was built, and that only one recovery could be had. This case is similar to the one last above cited, but distinguishable from it. The difference, however, consists in the fact that the railroad bed was deemed a permanent structure, in such sense that it was not to be presumed that the company would remove it. The turnpike buttresses were not of such character. So, too, in the case where the defendant had placed stumps and stakes in the plaintiff's ditch, the obstruction was not permanent. In the *Town of Troy v. Cheshire Railroad Co.*, above cited, BELL, J., said: 'Wherever the nuisance is of such character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated.'

"The principle thus stated is sufficient to enable us to tread our way through any apparent difficulties which surrounded our

general doctrine announced by the court, that, when the damage is complete by the original act creating the nuisance, the statute begins to run

path. In the light of it we can see that in a case of overflow from a mill-dam the injured party should be allowed to maintain successive suits. Somewhat depends on the way the dam is used. The injury, therefore, is not uniform. But, what is of controlling importance, the dam if not maintained will go down, as surely as the sun will go down, and the nuisance of itself will come to an end. Its duration will be determined by freshets and other forces which are contingent and therefore incalculable. It may, indeed, be so built that it should be regarded as permanent. In such case it is said that the damage should be considered and treated as original. *The Town of Troy v. Cheshire Railroad Co.*, above cited.

"While no infallible test can be applied to enable us to determine whether a structure is permanent or not, inasmuch as nothing is absolutely permanent, yet, when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance and will necessarily result in damages, will make the damages original.

"If we apply the principle above stated to the case at bar, we must hold that the damages were original. The plaintiff's ground of complaint is that the ditch was improperly constructed. As constructed it resulted in the excavation of the plaintiff's lots. The damage consisted, not in excavating the lots, but in doing an act which resulted in their excavation.

"The result too was a necessary one, the ditch remaining as constructed. The cause of the difficulty was a permanent one in that it would not grow less unless remedied by human labor. The case, therefore, is strictly within the rule applied in *The Town of Troy v. Cheshire Railroad Co.*, above cited. Nor does the rule afford any difficulty in the assessment of damages, which is another test for determining the question under consideration, or rather the consideration of the difficulty of assessing damages is another way of applying substantially the same test. If the cause of the injury is permanent, the damages can be foreseen and estimated. If the cause of the injury is not permanent, if it depends

upon human volition (as the maintenance of a mill-dam), the damages cannot be foreseen and estimated. Where the buttresses were placed on the plaintiff's land, in *Holmes v. Wilson, et al.*, above cited, the damages could not be foreseen and estimated. The defenders were trespassers, and, the structure not being necessarily permanent, it was not to be presumed that the defendants would continue the trespass. The presumption was that it would be discontinued. But, there being no presumption as to the time when it would be discontinued, the damages could not be foreseen and estimated.

"The same principle lies at the foundation of the dictum in *McConnell v. Kibbe*, above cited, where the defendant owned the lower story and the plaintiff the upper stories of a house, and the defendant removed a partition brick-wall which was necessary for support. It could not be presumed that the defendant would allow the superincumbent stories to fall. It was to be presumed, therefore, that he would arrest the difficulty. With such a presumption the damages could not be foreseen and estimated.

"When the fall in the stream in question had moved back from the county ditch to the plaintiff's lots and the creek ditch began to deepen and widen along those lots, as it had been doing for six years on the land below, no especial foresight, we apprehend, was needed to predict the result. At all events, it must be assumed that that may be foreseen which results from the ordinary and constant forces of nature.

"The plaintiff's damage was susceptible of immediate estimation. No lapse of time was necessary to develop it. It was the difference between the value of his lots as they would have been if the ditch had been properly constructed, and the value of them as they were with the ditch as it was. To reach this value, regard might be had to the reasonable cost of the remedy for the trouble, if the cost would not be greater than the probable damage which would ensue if no remedy were applied. The remedy, whether a wall or

from that time; yet, in the particular case under the facts stated, we cannot assent to the ruling of the court, that the plaintiff's remedy was full and complete where damage first intervened from the defendant's acts. According to the statement of the court, the damages resulted from day to day by the widening of the ditch, until, from a ditch of a few feet in width, it extended to a width of fifty feet, and might, except for the act of the plaintiff by the erection of the wall, have extended indefinitely. To say that the plaintiff was bound to know from the first injury to the estate that this result, in the very nature of things, would ensue, is neither logical nor natural; and, without stopping to elaborate upon the matter, we must say that it is not within the reason of the case upon which the court relied.¹ In that case the damage was complete when the act creating the nuisance was completed; but in the Iowa case the damage was progressing from day to day, and could not have been foreseen. The injury, as first existing, did not destroy the plaintiff's estate, nor inflict such damage as could be said to be permanent or continuous. In the case last referred to,² and which may be said to carry the doctrine to the very extreme limit, the original act creating the nuisance at once produced all the damage that ever could result from the act, and destroyed all that part of the estate of the plaintiff for all practical purposes, so that when the act was completed all the damage that could be effected thereby was consummated; but in the Iowa case, while the original act was unlawful, yet the consequences thereof could not have been foreseen in its inception, and the damages therefrom to the plaintiff's estate were not susceptible of ready or immediate computation; so that, in our judgment, the wrong was apportionable, and might have been the ground of separate and distinct actions, the last of which should have

something else, it was the plaintiff's privilege to apply."

¹ *Troy v. Cheshire R. R. Co., ante.* A. is the owner of a house, and B. is the owner of a mine under it, and, in working the mine, leaves insufficient support to the house. The house is not damaged until some time after the workings have ceased. Held, that A. could bring an action at any time within six years after the mischief happened, and was not bound to bring it within six years after the work was done which originally led to the mischief. *Backhouse v. Bonomi*, 1 El. B. & S. 970.

The defendants were the trustees of a turnpike road, and the plaintiff alleged that they so negligently made and maintained certain catchpits for carrying off the water from the road that large quantities of water ran into his land and collieries,

whereby he was greatly damaged. The plaintiff first complained in July, 1859, and the defendants made some alterations; he was again damaged, and complained in December of the same year, and eventually brought this action. On behalf of the defendants, it was contended that the action was not brought in time, inasmuch as it was not brought within three months after the act complained of was committed, as enacted by sec. 147 of the Turnpike Road Act, 3 Geo. IV. c. 126. Held, that the action was in time, as no cause of action arose to the plaintiff so long as the works of the defendants caused him no damage, and that the cause of action first accrued when the plaintiff received actual damage. *Whitehouse v. Fellowes*, 9 C. B. N. S. 901; *Same v. Same*, 10 id. 765.

² *Troy v. Cheshire R. R. Co., ante.*

dated from the period when the injury was finally checked by the erection of the wall, which the plaintiff was under no obligation to erect, but the expense of the erection of which was a proper element of damage.¹ The doctrine of the Iowa case is in conflict with the doctrine of a leading English case.² In that case it appeared that in 1833 a manufactory was erected on a close; and in 1841 and between that time and 1849 the buildings were enlarged. In March, 1842, the close and buildings, which were leased for a term which expired in October, 1851, were conveyed in fee by S., the owner, to C. C. died in 1849, and in November, 1851, the devisees under his will conveyed the close and buildings to the plaintiff in fee, who before 1849 was assignee of the term and occupied the buildings. In 1849 and 1850 the defendants, in getting coal from their mines, near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby, in fact, sustain any damage, inasmuch as they incurred no expense, and continued to receive the full rent for the premises, and upon the sale thereof obtained the full value, without reference to any injury thereto (of which they were ignorant) by the mining operations. Subsequently to the sale to the plaintiff, the working of the mines under lands near to but not adjoining the close on which the buildings stood occasioned a further subsidence. No damage was done by the working of the mines subsequently to July, 1852; but the subsidence of the ground continued, — the consequence of the previous mining operations. The mining was skillfully conducted, and the buildings did not contribute to the subsidence. In August, 1855, the plaintiff brought an action against the defendant. Held, that he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair and working order, and the diminished profits both in respect of his occupation before and after the purchase, and that the statute of limitations did not bar the plaintiff's claim. We think that in the Iowa case the court failed to make a proper distinction between a wrongful act amounting to a nuisance which of itself creates a complete and permanent injury, and a nuisance, which is permanent, but the injury from which is not only continuous but also constantly increasing. In the former case, there can be no doubt but that the statute would run from the completion of the thing creating the nuisance;

¹ *Plumer v. Harper*, 8 N. H. 88. In *Polly v. McCall*, 37 Ala. 20, an action was brought for injuries resulting to the plaintiff's land from the diversion of the water of a brook by means of a ditch and levee, which when first constructed did not injure the plaintiff's land, except at times of great floods. Subsequently, the ditch became filled with sand, and the plaintiff's land

was injured by the overflow of water from it. The court held that, as no action could accrue to the plaintiff until his lands were injured from the maintenance of the ditch, the defendant could acquire no title by presumption except from that period.

² *Hamer v. Knowles*, 6 H. & N. 454. See also *Bonomi v. Backhouse*, *ante*.

but in the latter case successive actions would lie until the nuisance is abated.¹

SEC. 181. Action must be brought before Prescriptive Right has been acquired. — While, as we have stated, each continuance of a nuisance is treated as a new nuisance, and furnishes a new ground of action which affords a good ground of recovery, although the statute may have run upon former injuries from the same nuisance, yet this proposition only holds good when the action is brought before the person erecting or maintaining the nuisance has acquired a prescriptive right to do so, by the lapse of such a period as bars an entry upon lands adversely held by another,² that being the period universally adopted in this country for the acquisition of prescriptive rights.³ It has been doubted, in at least one case,⁴ whether a prescriptive right could be acquired to maintain a nuisance that merely polluted the atmosphere with offensive smells, or smoke and noxious or destructive vapors; but, regardless of this case, it may be said that according to the authori-

¹ See *Whitehouse v. Fellowes*, 10 C. B. N. S. 765, the gist of which is given *ante*, p. 461, note.

In *Colrick v. Swinburne*, 105 N. Y. 503, it was held that the diversion by the owner of land on which is a spring, of the water of the spring from its natural channel, whereby an owner below is deprived of the use of the water on his premises, is a legal injury for which the party injured is entitled to compensation in damages. Whether the use made by the owner of the spring is a reasonable exercise of his right, is a question of fact for a jury. Where the injury complained of was the diversion of the waters of a spring from the plaintiff's tannery, it was held that the diminished rental value during the period of diversion was the proper measure of damages.

Where a complaint in such an action set forth the facts, it was held, it was not material that the plaintiff did not demand the precise damages to which he was entitled, or that he mistook the true rule of damages; that he was entitled to whatever legal damages were recoverable for the wrong.

Where a bill of particulars in such an action has been served, and evidence is received without objection, showing other damages than therein set forth, the objection that plaintiff must be confined to a recovery of damages of the exact nature

therein specified, may not thereafter be raised. It should be raised by objection to the testimony on the ground of variance from the bill of particulars. Such a diversion of water is a continuing injury, and is not referable exclusively to the day when the original wrong was committed, and although that was more than six years before the commencement of the action to recover damages, the action is not barred by the statute of limitations except to the damages which accrued prior to the six years, adding thereto, in case the action is by or against an executor or administrator, the further extension allowed in such cases.

Where the action is against an executor or administrator the three years' statute of limitations does not apply, as the action was not for taking, detaining, or injuring personal property.

Where it is claimed by the defendant in such an action that the plaintiff's damages have been enhanced by his own culpable negligence or inaction, the burden of proving this is upon the defendant.

² Wood on Nuisances, 717 *et seq.*

³ *Marr v. Gilliam*, 1 Cold. (Tenn.) 488; *Sibley v. Ellis*, 11 Gray (Mass.), 417.

⁴ *Campbell v. Seamen*, 2 T. & C. (N. Y.) 240. See same case, 63 N. Y. 568, but this question was not passed upon.

ties such a right can be acquired.¹ The burden of establishing the right by user is upon him who asserts it; and, applying the rules applicable to the acquisition of such rights, there are very few cases in which it can be clearly established.²

SEC. 182. **What requisite to establish Prescriptive Right.** — The fact that a noxious trade has been exercised for twenty years in a particular locality does not by any means establish a prescriptive right to exercise it there. It is, however, evidence from which, in connection with other proof, the right may be established. But, in order to establish the right as against any party complaining, the burden is imposed upon the defendant, who sets up the right as a defence, of proving that for the period of twenty years he has sent over the premises in question

¹ *Duncan v. Earl of Moray*, 15 F. C. (Scotch) 302. In *Dana v. Valentine*, 5 Met. (Mass.) 8, the defendant erected a slaughter-house in the suburbs of Cambridge, and maintained it there for the purpose of slaughtering cattle, boiling soap, and manufacturing candles, from the year 1825 down to the time when the plaintiffs brought their bill for an injunction, with a cesser of only two years. The plaintiffs being the owners of vacant lots, and some of them of dwelling-houses within the sphere of its effects, brought a bill to restrain the defendant from carrying on his business there. The defendant set up a user of his premises for that purpose for twenty-four years, and claimed that he had acquired a right, as against the plaintiffs, to carry on his trade in that place. The court denied the injunction, upon the ground that it appeared that the defendant might have acquired a prescriptive right to exercise his trade there. The court say; "The defence is, that the defendant, and those under whom he claims his title, have been in the possession of the buildings in which he carries on his trade for more than twenty years, during which time he and they carried on his trade without molestation or interruption, except for about two years, during which the buildings were not so used by them. This, *prima facie*, is a good foundation for the presumption of a grant, unless the said non-user is to be considered as breaking the continuity of the possession. The facts and circumstances in evidence are not sufficient to enable the court to give any decisive opinion on this point; but, such as the evidence is, it is

not sufficient to show any relinquishment or abandonment. Another objection to the defendants' title by presumption is, that until lately the plaintiffs suffered no damage from the alleged nuisance, and therefore could not interfere to prevent its continuance. But it is very clear that when a party's right of property is invaded he may maintain an action for an invasion of his right, without proof of actual damage." *Grant v. Lyon*, 4 Met. (Mass.) 477; *Atkins v. Boardman*, 2 id. 469; *Bolivar Manufacturing Co. v. Neponset Manufacturing Co.*, 16 Pick. (Mass.) 247. In *Charity v. Riddle*, 14 F. C. (Scotch) 302, the defendants had erected or carried on in the suburbs of Glasgow for more than twenty years an establishment for the manufacture of glue, which emitted nauseous and offensive stench. Upon a hearing upon a petition for an interdict to prevent the defendant from enlarging his works, the court held that, by an unmo- lested, uninterrupted exercise of his trade there for more than twenty years, the defendant had acquired a prescriptive right, as against the plaintiff, to continue it, but that he could not increase the nuisance by increasing the capacity of his works, and prohibited him from enlarging them. *Colville v. Middleton*, 19 F. C. (Scotch), 339; *Miller v. Marshall*, 5 Mur. (Scotch) 32; *Tipping v. St. Helen Smelting Co.*, 1 L. L. Cas. 643; *Bliss v. Hall*, 6 Scott, 500; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Roberts v. Clark*, 18 L. T. N. S. 48; *Flight v. Thomas*, 10 Ad. & El. 590.

² *Bradley's Fish Co. v. Dudley*, 37 Conn. 136.

from his works an atmosphere equally as polluted and offensive as that complained of.¹ Proof that he has polluted the air is not enough: he must show that for the requisite period he has sent over the land an atmosphere so impure and polluted as to operate as an actual invasion of the rights of those owning the premises affected thereby, and in such a manner that the owner of the premises might have maintained an action therefor.² Less than that is insufficient. He must also show

¹ *Flight v. Thomas*, 10 Ad. & El. 590.

² *Roberts v. Clarke*, 18 L. T. N. S. 48; *Luther v. Winnissimmet Co.*, 9 Cush. (Mass.) 171. It is not enough to show that a noxious trade has been exercised in a particular locality for twenty years, and a plea setting up a prescriptive right in that way would be bad, and a verdict for the defendant upon such a plea would be set aside. In *Flight v. Thomas*, 10 Ad. & El. 590, the plaintiff brought an action against the defendant for sending offensive smells over his premises. The defendant replied by setting up that, for more than twenty years prior to the bringing of the plaintiff's action, he by himself and his predecessors had enjoyed and exercised the right, without molestation, of using a certain mixen in and upon his premises, and that the smells and stanches complained of in the plaintiff's declaration arose from said mixen, necessarily and unavoidably; but the plea did not allege that the smells had gone over the plaintiff's land for twenty years. The jury found that the mixen was a nuisance, but that the plaintiff had used it for more than twenty years, and a verdict was thereupon entered for the defendant. Upon a rule to show cause why judgment should not be rendered for the plaintiff *non obstante veredicto*, LORD DENMAN, C. J., said: "There is no claim of an easement, unless you make it appear that the offensive smell has been used for twenty years to go over to the plaintiff's land. The plea may be completely proved without proving that the nuisance ever has passed beyond the limits of the defendant's own land." LITLEDALE, J., said: "The plea only shows that the defendant has enjoyed, as of right, and without interruption for twenty years, the benefit of something that occasioned a smell in his own land." The judgment was reversed and judgment rendered for

the plaintiff *non obstante veredicto*. The right being only to the extent of the use, and it being incumbent upon the defendant to establish the right by proving a use as extensive as that complained of, *Ballard v. Dyson*, 1 Taunt. 179; *Richardson v. Pond*, 15 Gray (Mass.), 389; *Atwater v. Bodfish*, 11 Gray (Mass.), 152; and in addition thereto, to prove that for the requisite period the noxious smells have passed over the plaintiff's premises, to such an extent as to be a nuisance, and actionable as such, *Flight v. Thomas*, 10 Ad. & El. 590; and the presumption being that he who does an act upon his own premises confines all its ill effects there, the difficulty of establishing a prescriptive right in such a case is obvious, *Flight v. Thomas*, *ante*; and the burden assumed by the plaintiff in such cases is, of showing that during the whole prescriptive period the user has been unlawful, *Monks v. Butler*, 1 Roll. 83; *Powell v. Millbank*, 2 H. Bl. 851; *Branch v. Doane*, 17 Conn. 402; *Casper v. Smith*, 9 S. & R. (Penn.) 33; *Cooper v. Barber*, 3 Taunt. 99; *Polly v. McCall*, 37 Ala. 90; *Murgatroyd v. Robinson*, 7 El. & B. 391. The rule is, that "a prescription is entire and cannot be split" by either the party setting it up or the party opposing it. In *Rogers v. Allen*, 1 Camp. 308, the plaintiff brought an action of trespass against the defendant for breaking and entering a several fishery. The plaintiff alleged in his declaration a prescriptive right of fishing over four places in a navigable river. Upon trial, he failed to prove a right in but three; and the court held that when an action is brought to recover for an injury to a prescriptive right, the prescription must be proved as laid, and that if the right is only shown to exist in three of the places named in the declaration, the variance is fatal, and no recovery can be had even though it is also

that his user at the time when the action is brought is not substantially in excess of that which he has exercised during the period requisite to acquire the right.¹ The right is restricted to and measured by the use.² For all excess of user an action lies. The enjoyment of a limited right cannot lawfully be enlarged, and any excess of use over that covered by the actual user under which the right was gained will be actionable.³

In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the particular right which it is sought to quiet, to such an extent that during the whole period of use the party whose estate is sought to be charged with the servitude could have maintained an action therefor. The rule is, that a prescription can only operate against one who is capable of making a grant. Therefore, if the estate was in the possession of a tenant for

shown that the trespasses were committed in one of the three places over which the right existed. The party does not fail because he shows the right to be more ample than he has laid it, *Johnson v. Thoroughgood*, Hob. 64; *Bushwood v. Bond*, Cro. Eliz. 722; but he must prove it to exist to the full extent claimed, *Rotheram v. Green*, Noy, 67; *Congers v. Jackson*, Clay, 19; *Corbett's Case*, 7 Coke, 5; *Hickiran v. Thorny*, Free, 211; *Kingsmill v. Bull*, 9 East, 185; *Morewood v. Jones*, 4 T. R. 157. The effect of this rule is this: where a person sets up a prescriptive right to do an act with which he is charged in an action on the case, as for the pollution of the atmosphere over the plaintiff's premises, by carrying on a particular trade, he is bound to set up a right to do all that he is charged with doing, in the declaration that forms the basis of an action for damages. He cannot defend by setting up a prescriptive right to do less; and if he sets up a prescriptive right to do all that he is charged with doing, his plea fails if he does not show a right as extensive as the one exercised by and charged against him in the declaration. Therefore he does not sustain his plea by proof of a right to pollute the air, unless he also shows that he had a right to pollute it to the extent and with the results charged and proved against him. This was held as early as the case of *Rotheram v. Green*, Noy, 67, and has not been materially varied since. The soundness of the doctrine is apparent, and is well sustained by authority. *Tapling*

v. Jones, 11 H. L. Cas. 290; *Weld v. Hornby*, 7 East, 195; *Bailey v. Appleyard*, 3 Nev. & P. 172; *Wilcome v. Upton*, 6 M. & W. 536.

¹ *Weld v. Hornby*, 7 East, 195; *Topling v. Jones*, 11 H. L. Cas. 265; *Goldsmith v. Tunbridge Wells, &c. Improvement Co.*, L. R. 1 Eq. Cas. 352; *Baxendale v. Murray*, L. R. 2 Ch. App. 790; *Ball v. Ray*, 8 id. 467; *Crossley & Sons v. Lightowler*, L. R. 3 Eq. Cas. 279; *Stein v. Burden*, 24 Ala. 130.

² *Ballard v. Dyson*, 1 Taunt. 277; *Jackson v. Stacey*, 1 Holt, 455; *Cowling v. Higginson*, 4 M. & W. 245; *Peardon v. Underhill*, 16 Q. B. 123; *Davies v. Williams*, id. 547; *Bower v. Hill*, 2 Bing. N. C. 339; *De Rutzen v. Lloyd*, 5 Ad. & El. 456; *Allan v. Somme*, 11 id. 759; *Higham v. Rabett*, 5 Bing. N. C. 622; *Henning v. Barnett*, 8 Exch. 187; *Brooks v. Curtis*, 4 Lans. (N. Y. S. C.) 283; *Wright v. Moore*, 39 Ala. 593; *Atwater v. Bodfish*, 11 Gray (Mass.), 152; *Rexford v. Marquis*, 7 Lans. (N. Y. S. C.) 257; *Simpson v. Coe*, 4 N. H. 301; *Horner v. Stilwell*, 35 N. J. 307; *Noyes v. Morrill*, 108 Mass. 396; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Burrell v. Scott*, 9 id. 279; *Dyer v. Dupey*, 5 Whart. (Penn.) 584; *Rogers v. Allen*, 1 Camp. 313; *Martin v. Gable*, id. 320; *Bealey v. Shaw*, 6 East, 208.

³ *Chandler v. Thompson*, 3 Camp. 80; *Weld v. Hornby*, 7 East, 195; *Tapling v. Jones*, 11 H. L. Cas. 290; *Staight v. Burn*, L. R. 5 Ch. App. 163.

life,¹ or for a term,² or if the owner of the fee was a minor,³ a married woman,⁴ or an insane person,⁵ no right can be acquired during the term, or while the disability exists. In order to acquire the right, the person owning the estate affected thereby must be in a condition to resist it. But where the adverse use has begun before the owner of the servient estate lets it, the letting of the estate does not prevent the acquisition of the right. He having been in a position to resist the adverse use, cannot, by voluntarily putting himself in a position where he cannot resist it, prevent the perfection of the right while the estate is in the possession of the tenant.⁶ Neither does the fact that the premises are in the possession of a tenant prevent the perfection of the right, if the injury is of such a character, and is known to the landlord, that he could maintain an action for an injury to the reversion.⁷

It is only as against such rights as operate an injury to the reversion, so that an action can be maintained by the reversioner therefor, that a prescriptive right can be acquired while the premises are in the possession of a tenant; and then, in order to acquire the right, the user must be open, and of such a character that the reversioner may fairly be presumed to have knowledge of it, or actual knowledge must be shown. Indeed, the user must be such that it can fairly be said to be with the acquiescence of the reversioner, and an acquiescence by the tenant does not bind him.⁸ The user must also be shown to have been peaceable and uninterrupted, so that it can be said to have been acquiesced in by the owner of the estate affected by it.⁹ The prescription begins to run from the time when a legal right is actually invaded by the nuisances, so that the law will imply damage therefrom, and must continue for the period requisite under the statute for acquiring a title to land by adverse enjoyment.¹⁰

¹ *McGregor v. Waite*, 10 Gray (Mass.), 75; *Barker v. Richardson*, 4 B. & Ald. 579; *Wood v. Veal*, 5 B. & S. 454; *Harper v. Charlesworth*, 4 B. & C. 574.

² *Wood v. Veal*, *ante*. In *Bright v. Walker*, 1 C. M. & R. 211, it was held that the user must be such as to give a right against all persons having estates in the lands affected thereby. See *Winship v. Hudspeth*, 10 Exch. 8, ALDERSON, B.

³ *Watkins v. Peck*, 13 N. H. 360; *Mebane v. Patrick*, 1 Jones (N. C.), 26.

⁴ *McGregor v. Waite*, *ante*.

⁵ *Edson v. Munsell*, 10 Allen (Mass.), 557.

⁶ *Mebane v. Patrick*, *ante*; *Cross v. Lewis*, 2 B. & C. 686; *Tracey v. Atherton*, 36 Vt. 503; *Wallace v. Fletcher*, 10 Foster (N. H.), 434; *Tyler v. Wilkinson*, 4 Mason (U. S.), 402.

⁷ *Wallace v. Fletcher*, 10 Foster (N. H.), 153; *Shadwell v. Hutchinson*, 4 C. & P. 333; *Tucker v. Newman*, 11 Ad. & El. 40.

⁸ *Bradbury v. Grinsel*, 2 Wm. Saunders, 175, n.

⁹ *Bealey v. Shaw*, *ante*; *Stillman v. White Rock Co.*, 3 W. & M. (U. S. C. C.) 549; *Nichols v. Aylor*, 7 Leigh (Va.), 546; *Smith v. Miller*, 11 Gray (Mass.), 148; *Tracey v. Atherton*, 36 Vt. 514; *Powell v. Bragg*, 8 Gray (Mass.), 441; *Bailey v. Appleyard*, 3 N. & P. 157.

¹⁰ *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Parks v. Mitchell*, 11 Exch. 788. But as to what is such a continuous user as will perfect the right, is a question to be determined from the circumstances of each particular case, and is to be determined with reference to the nature and character

SEC. 183. *Trover*.—The statute begins to run in an action of trover from the time of conversion.¹ Thus, in the Pennsylvania case cited in

of the right claimed. It is not to be understood that the right must be exercised continuously, in the strict sense of the word, without cessation or interruption, but that it is to be exercised as continuously and uninterruptedly as the nature of the right claimed requires, in order to satisfy a jury that the right claimed is commensurate with the user. Thus, in order to acquire a right of way across another's land, it is not essential that the person asserting the right should have passed over the way every day in the year, or even every month in the year. It is sufficient if he has used the way as his convenience and necessity required, and that his user be such as to leave no room to doubt his intention to maintain his use of the way as of right. *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Bodfish v. Bodfish*, 105 Mass. 317; *Lowe v. Carpenter*, 6 Exch. 630, *PARKER, B.*; *Parks v. Mitchell*, 11 Exch. 788; *Hogg v. Gill*, 1 McMullen (S. C.), 359; *Nash v. Peders*, 1 Speers (S. C.), 17. But he must not suffer unreasonable periods to elapse between his acts of user. Thus it has been held, that where a party claiming a right of way over another's land to get the hay from an adjoining lot once each year, the exercise of this right once a year, as of right, will sustain a prescriptive right for such a use. *Carr v. Foster*, 3 Q. B. 581. But such a user would not confer a right of way for any purpose and at any time that the party might see fit to exercise it. The continuity must not be broken, and whether or not it has been depends upon the nature of the easement claimed, and non-user in reference thereto. In Coke's Litt. 1136, the doctrine as borrowed from Bracton is laid down as follows: "The possession must be long, continuous, and peaceable. Long, that is, during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceable, because if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be long use, without force, without secrecy, as of right, and without interruption." Here all the

requisite elements to acquire a prescriptive right are concisely stated; and whether or not they exist in a given case is a question of fact to be determined by the jury, in view of the right claimed, the manner in which it has been used, and the purpose of its use. The burden of establishing the existence of all these elements, and consequently of establishing the right, is always upon him who asserts it. *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Watt v. Trapp*, 2 Rich. (S. C.) 136; *Geranger v. Summers*, 2 Ired. (N. C.) 229; *Winnepisogee Co. v. Young*, 40 N. H. 436.

¹ *Horsefield v. Cast*, Add. (Penn.) 152; *Outhouse v. Outhouse*, 13 Hun (N. Y.), 130; *Montague v. Sandwich*, 7 Mod. 99; *Fishwick v. Sewall*, 4 H. & J. (Md.) 393. In this view it becomes important to ascertain what amounts to a conversion; and it may be said that any illegal act of dominion over the property of another which amounts to the assertion of a title therein, and in defiance of the real owner's title, is a conversion, *Beckley v. Howard*, 2 Brev. (S. C.) 94; *Webber v. Davis*, 44 Me. 147; whether the person knew of the plaintiff's title thereto or not, *Harris v. Saunders*, 2 Strobb. (S. C.) 370; and even though a person does not claim title in the goods, yet if he exercises dominion over them, as if he threatens to sue the owner if he enters upon his premises to take them away, he is chargeable with their conversion, *Hare v. Pearson*, 4 Ired. (N. C.) 76. Where the original taking is wrongful, a right of action accrues immediately without a demand, and of course the statute begins to run from that time, *Farrington v. Payne*, 15 Johns. (N. Y.) 431; *Woodbury v. Long*, 8 Pick. (Mass.) 543; *Davis v. Webb*, 1 McCord (S. C.), 213; nor is a demand necessary where there has been an actual conversion, *Darrell v. Mosher*, 8 Johns. (N. Y.) 445; *Tompkins v. Hale*, 3 Wend. (N. Y.) 406; *Hines v. McKinney*, 3 Mo. 382; *Jewett v. Partridge*, 12 Me. 243. But when goods are rightfully obtained, and there has been no actual conversion, a demand is necessary before an action can be brought, and in such a case the statute begins to run from the

the last note, an action of trover was brought for a United States certificate levied upon and sold on an execution, and it was held that the statute began to run from the date of sale. But, if there had been a demand upon the officer for the certificate before the sale, the statute would have run from the time of demand and refusal, because a refusal to deliver up property which the defendant has no right to keep on demand amounts to a conversion of itself.¹ Where an actual conversion is shown to have been made, although not known to the owner, the statute runs from the date of the conversion, unless the defendant has fraudulently concealed the fact, or been guilty of fraud to prevent the owner from obtaining knowledge of it within the statutory period.² So

time of demand. *Montague v. Sandwich*, *ante*; *Thorogood v. Robinson*, 6 Q. B. 722; *Baldwin v. Cole*, 6 Mod. 212.

¹ *Reade v. Markle*, 3 Johns. (N. Y.) 523; *Montague v. Smith*, *ante*. In *Compton v. Chandless*, 4 Esp. 20, LORD KENYON said, as to the plea of the statute of limitations, that the inclination of his mind was that the plea was insufficient. That in the case of an action for trover, if the goods are left with another the statute of limitations does not begin to run from the time of delivery, but from the time of demand and refusal. According to LORD HOLT, the very assuming to one's self the property and right of disposing of another man's goods is a conversion of them. "And certainly," observes LORD ELLENBOROUGH, "a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?" *M'Combie v. Davies*, 6 East, 540. And if such person acts as agent for another who subsequently, although without knowledge that the sale was illegal, adopts it, the latter will also be liable. *Hilbery v. Hatton*, 33 Law J. Exch. 190; *Fowler v. Hollins*, L. R. 7 Q. B. 616.

When the chattels of the plaintiff have not been wrongfully taken possession of by the defendant, but have come into his hands in a lawful manner, he cannot be made responsible for a conversion of them until they have been demanded of him by the owner or the person entitled to the possession of them, and he has refused to deliver them up. Whenever, therefore, the goods of one man have lawfully come into the hands of another, the owner, or

person entitled to the possession of them, should go himself, or send some one with a proper authority to demand and receive them; and if the holder of the goods then refuses to deliver them up, or permit them to be removed, there will be evidence of a conversion. *Thorogood v. Robinson*, 6 Q. B. 772; for "whoever," observes HOLT, C. J., "takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them," and is guilty of a conversion. *Baldwin v. Cole*, 6 Mod. 212. The demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period. *Wilton v. Girdlestone*, 5 B. & Ald. 847.

² *Granger v. George*, 5 B. & C. 149; *Johnson v. White*, 21 Miss. 584; *Smith v. Newby*, 18 id. 159; *Short v. McCarthy*, 3 B. & C. 626; *McWills v. Browne*, 15 Mass. 82; *Ward v. Dulancy*, 23 Miss. 410; *Clark v. Marriott*, 9 Gill (Md.), 381; *Brown v. Howard*, 2 B. & B. 73; *Jordan v. Thornton*, 7 Ga. 517; *Deuch v. Walker*, 14 Mass. 499; *Harris v. Saunders*, 2 Strobb. (S. C.) 370; *Ashmead v. Kellogg*, 23 Conn. 70. That a fraudulent concealment of the fact of conversion will defeat the operation of the statute, except from the time when the facts were or ought to have been discovered, has been held in South Carolina and Mississippi, and doubtless would be held in all the States where fraud is regarded as sufficient to suspend the operation of the statute in any case. *Fears v. Sykes*, 35 Miss. 683; *Clarke v. Reeder*, 1 Speers (S. C.), 398; *Simons v. Fox*, 12 Rich. (S. C.) L. 392.

where the original taking is unlawful, as no demand is necessary, or proof of actual conversion, a right of action accrues from the time of the taking.¹ The question as to how far the title to personal property is affected by its retention by a person until the statute has barred an action for its recovery is one of considerable importance; and it may be said that, within the jurisdiction where the statute has run upon the claim, there seems to be no question but that the effect of the statute is to transfer the legal title to the person in possession, so that he may maintain an action even against the former owner for any interference therewith.² Thus, where a tenant erects buildings upon leased premises and permits them to remain there for more than six years after his time has expired, the statute of limitations bars all claim for their recovery by him, and transfers the title thereto to the owner of the land.³ But, in order to defeat the title of the true owner to the property, the possession must be adverse, the same rule obtaining in this respect as obtains relative to lands;⁴ but the possession must be continuous in the person seeking to avail himself thereof, and he cannot tack it to the possession of another, and thus acquire title under the statute.⁵ If the property is held as bailee under a contract, or in recognition of the owner's title, the statute does not run against the owner until the person so holding it has done some decisive act evincing a determination to deny the owner's title. Thus, where bonds were pledged to a person as security for a loan, and held by him for several years, it was held that the statute did not begin to run against the owner until he had repaid the loan and demanded the bonds; and then, upon the refusal or neglect of the pledgee to return them, the statute began to run, and not before.⁶ In such a case, the owner has his choice of remedies, either in trover for the conversion, or in assumpsit for the value, of the property, upon the implied contract to return the property on payment of the loan; consequently, although an action of trover may be barred, a remedy may still remain upon the implied contract.⁷

SEC. 184. **Trespass, Assault, &c.** — In an action for seizing personal property under an execution against a stranger, the statute begins to run from the date of seizure, and the fact that a claim to the property is interposed and litigated in the same case will not suspend the opera-

¹ *Davis v. Webb*, 1 McCord (S. C.), 213; *Woodbury v. Long*, 8 Pick. (Mass.) 543.

² *Mercein v. Burton*, 17 Tex. 206; *Winburn v. Cochran*, 9 id. 123, also 143; *Cockfield v. Hudson*, 1 Brev. (S. C.) 311; *McArthur v. Carver*, 32 Ala. 75; *Howell v. Hair*, 15 id. 194; *Bohanan v. Chapman*, 17 id. 696; *Ewell v. Tedwell*, 20 Ark. 136; *Vandever v. Vandever*, 3 Met. (Ky.) 137; *Clarke v. Slaughter*, 34 Miss. 65; *Devine v. Bullock*, 3 Met. (Ky.) 418.

³ *Preston v. Briggs*, 16 Vt. 124.

⁴ *Baker v. Chase*, 55 N. H. 61.

⁵ *Beadle v. Hunter*, 3 Strobb. (S. C.) 31; *Hobbs v. Bullard*, 5 Sneed (Tenn.), 395; *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 361; *Wells v. Ragland*, 1 Swan (Tenn.), 501.

⁶ *Roberts v. Berdell*, 61 Barb. (N. Y.) 37; *Jones v. Jones*, 18 Ala. 248.

⁷ *Kirkman v. Phillips*, 7 Heisk. (Tenn.) 222.

tion of the statute; ¹ and in all cases of trespass, either to the person or property, the statute runs from the time it was committed, ² and not from the time when the full extent of the injury was ascertained. This is also the rule as to trespass *quare clausum fregit* for mesne profits. ³ In equity as well as at law, in the absence of any special circumstances to the contrary, a trespasser in possession of the estate of another must account for the mesne profits for the whole time he has been in possession, so far as the account is not barred by any express statute. But such circumstances are readily assumed; and where the defendants have been in justifiable ignorance of plaintiff's title, the account will usually be taken only from the date of the filing of the bill. ⁴ In an adverse suit in the nature of an ejectment bill, the account is directed only from the filing of the bill; but in a suit against a person in a fiduciary character the account is taken either from the original period, or if the court thinks so fit, on account of the plaintiff's laches, for the six years only previous to the filing of the bill. ⁵ But this is so only in cases where there is, to quote the words of TURNER, L. J., "No fraud, no suppression, no infamy." ⁶

SEC. 185. **Criminal Conversation.** — An action for *crim. con.* is treated as an action on the case rather than in the nature of trespass, as the injury is consequential rather than direct, and consequently the life of the remedy depends upon the statutory period provided for actions on the case. ⁷ Of course the statute begins to run from the time when the offence was committed. ⁸

SEC. 186. **Seduction.** — In an action for seduction, the statute begins to run from the date of the seduction; but in an action by a parent for the loss of service resulting from such seduction, the statute does not begin to run until the birth of the child and the mother's recovery therefrom, ⁹ or in other words, until the loss of service has accrued.

SEC. 187. **Failure to perform Duty imposed by Statute.** — Where the statute imposes a duty, and specifies a time within which it shall be performed, and gives to certain parties a remedy if it is not performed, the statute begins to run immediately upon the failure to perform within the time specified. Thus, where the statute requires the officers of a corporation to file an annual report in a certain office, on or before

¹ Baker v. Boozer, 58 Ga. 195.

² Kerns v. Schoomaker, 4 Ohio, 331.

³ Hill v. Myers, 46 Penn. St. 15; Lynch v. Cox, 28 id. 265.

⁴ Dormer v. Fortescue, 3 Atk. 124; Pettiward v. Prescott, 7 Ves. 541; Bowes v. East London Waterworks, 3 Madd. 375-383; Attorney-General v. Corporation of Exeter, 2 Russ. 45; Clarke v. Yonge, 5 Beav. 523.

⁵ Per WOOD, V. C., in Thomas v. Thomas, 2 K. & J. 79.

⁶ Hicks v. Sallitt, 3 De G. M. & G. 782.

⁷ Cook v. Sayer, 2 Wils. 85; Sanborn v. Neilson, 5 N. H. 314; Macfadden v. Olivant, 6 East, 388.

⁸ Tidd's Practice, 5.

⁹ Wilhoit v. Hancock, 5 Bush (Ky.), 567.

a certain day, and provides certain remedies upon a failure to make such report, the statute begins to run immediately upon a failure to perform by the day named.¹ In all such cases, the decisive question is, When did the plaintiff's right of action first accrue? and from that date the statute runs.

¹ *Duckworth v. Boach*, 8 Daly (N. Y. C. P.), 159.



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